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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1980

RUBIN KREMER,

Petitioner,

-against-

CHEMICAL CONSTRUCTION CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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January 13, 1981

QUESTIONS PRESENTED

In a Title VII religious discrimination case, the Second Circuit--regarding itself as bound by its decision in an earlier pro se case in which none of the relevant authority (including this Court's interpretations of the de novo hearing requirement of Title VII) was briefed or discussed, and despite the contrary views of two other courts of appeals, eight district courts and the EEOC--held that the Federal claim was barred by the res judicata effect of a sharply limited state court review of a mandatory state agency determination under a state discrimination statute.

This petition thus raises the following questions:

1. Whether a Title VII action commenced in the Federal courts is barred by a plaintiff's appeal of a mandatory state administrative determination to a state court under a sharply limited standard of review?

2. Whether the court of appeals' decision in Sinicropi v. Nassau County, 601 F.2d 60 (2d Cir.), cert. denied, 444 U.S. 983 (1979), should be applied retroactively, thereby denying petitioner the de novo Federal trial that he had sought for several years before Sinicropi was decided?

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RUBIN KREMER,

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-against-

CHEMICAL CONSTRUCTION CORPORATION,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Rubin Kremer seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered on June 2, 1980 (rehearing en banc denied October 15, 1980).

PRIOR OPINIONS

The opinion of the court of appeals is reported at 623 F.2d 786 (2d Cir. 1980), and appears at A. 01.* Two opinions of the United States District Court for the Southern District of New York in this case are reported at 477 F. Supp. 587 (S.D.N.Y. 1979) (Sofaer, J.), and 464 F. Supp. 468 (S.D.N.Y. 1978) (Pierce, J.), and appear respectively at A. 12 and A. 28.

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* References to the Appendix to this petition will be cited as "A. ".

JURISDICTION

The judgment of the court of appeals, entered on June 2, 1980, appears at A. 01. The orders of that court of October 15, 1980, denying a timely filed petition for rehearing en banc (Judges Oakes and Newman dissenting), appear at A. 40-41. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the district court was based on 42 U.S.C. § 2000e-5(f) and 28 U.S.C. §§ 1331(a), 1337(a), 1343(a)(4).

STATUTES INVOLVED

The pertinent text of each of the statutes involved appears as indicated:

42 U.S.C. § 2000e-2(a) appears at A. 42.

42 U.S.C. § 2000e-5(c) appears at A. 42.

N. Y. Exec. Law § 296(1)(a) appears at A. 42.

N. Y. Exec. Law § 297-a(7)(e) appears at A. 42.

N. Y. Exec. Law § 298 appears at A. 43.

N. Y. Civ. Prac. Law § 7803(3) and (4) appears at A. 43.

STATEMENT OF THE CASE

Petitioner Rubin Kremer is a 63-year-old engineer who emigrated from Poland in 1970. Mr. Kremer was fired and denied reemployment by respondent Chemical Construction Corporation ("Chemico") allegedly because of his Jewish faith and his national origin. Petitioner is appealing to this Court because his religious and ethnic discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., were dismissed below without a judicial hearing despite the Congressional mandate in Title VII and the decisions of this Court that require a de novo

Federal court hearing of his claims.

A. Facts and State Proceedings. After his discharge, Mr. Kremer, acting pro se, filed a discrimination charge with the Equal Employment Opportunity Commission ("EEOC").* As required by the "deferral" provisions of Title VII,** the EEOC referred the complaint to the New York State Division of Human Rights ("NYHRD").

The NYHRD conducted what turned out to be the only investigation of petitioner's claims, and it was perfunctory at best.† Petitioner was summoned to "review" documents submitted by Chemico and was admonished by the functionary who conducted the session: "Read faster. I have to go for lunch." Subsequently, NYHRD issued its finding of no probable cause.

In his quest for a hearing at the administrative level, Mr. Kremer, still without counsel, appealed NYHRD's ruling to the New York State Human Rights Appeals Board and, thereafter, to the Appellate Division of the State Supreme Court. Under state law, both the Appeals Board and the Appellate

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* Petitioner had been employed by Chemico since 1973. A supervisor recommended a month before his discharge, "Hold for knowledge and skills." He was considered "technically competent . . . with excellent background", a "competent engineer". Shortly before he was fired, Mr. Kremer was removed from projects in which his work had produced cost savings and other improvements and was ordered to charge his time improperly and to waste time by needlessly writing up work.

Mr. Kremer was the only Jewish employee in his department. Other employees of the same job description who were laid off at the same time were later rehired, but Mr. Kremer was not despite repeated applications. Petitioner filed his charges under 42 U.S.C. § 2000e-2(a)(1974), A. 42.

** 42 U.S.C. § 2000e-5(c) (1974), A. 42.

† Petitioner presented his claims to the NYHRD under the state antidiscrimination statute. N.Y. EXEC. LAW § 296(1)(a) (McKinney Supp. 1972-1980), A. 42.

Division were limited to determining whether NYHRD's findings were "arbitrary or capricious" or "an abuse of discretion".* Neither had legal authority to hold a full hearing and neither had power to do more than remand to NYHRD for further investigation. The Appeals Board affirmed the determination of NYHRD and, without any hearing, the Appellate Division "confirmed" the Appeals Board order. Thus, Mr. Kremer's only court "hearing" (and that in a state, not a Federal court) occurred under a narrowly limited legal standard that prohibited anything approaching a de novo inquiry.

Relying entirely on NYHRD's "findings" and "record", the EEOC then decided that there was "not reasonable cause to believe the charge is true" and issued a right to sue letter so that petitioner could pursue his right to a trial de novo in a Federal court. This right exists regardless of the quality of mandatory administrative inquiries and proceedings.

B. Proceedings Below. Still without counsel, petitioner brought this action in the district court. Before filing its answer, respondent Chemico moved for dismissal or summary judgment on the ground of res judicata. Respondent, relying solely upon the decision in Mitchell v. National Broadcasting Company, 553 F.2d 265 (2d Cir. 1977), claimed that Mr. Kremer's appeal of the NYHRD's decision to the Appellate Division precluded any Federal court action. Mitchell had held that an employment discrimination action brought under 42 U.S.C. § 1981 (1974) is barred by the

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* See N.Y. EXEC. LAW § 297-a(7)(e) (McKinney 1972), A. 42; and N.Y. EXEC. LAW § 298 (McKinney Supp. 1972-1980), A. 43; N.Y. CIV. PRAC. LAW § 7803(3) and (4) (McKinney 1963), A. 43.

res judicata effect of an Appellate Division appeal from an NYHRD determination.

The district court initially denied respondent's motion in an opinion that carefully considered and rejected respondent's contention that the reasoning of Mitchell should be extended to Title VII cases. 464 F. Supp. 468 (Pierce, J.), A. 28. The district court concluded that significant distinctions between the statutory scheme of Title VII and the century-old section 1981 required different res judicata results. Id. at 472-73, A. 35-39.

Some months later, the Second Circuit decided another pro se case, Sinicropi v. Nassau County, 601 F.2d 60 (2d Cir.) (per curiam), cert. denied, 444 U.S. 983 (1979). The facts in Sinicropi were similar to those in Mitchell with one vital difference--Ms. Sinicropi was a Title VII complainant. The court of appeals, however, relied entirely on its reasoning in Mitchell and saw "no reason to distinguish between section 1981 and Title VII for res judicata purposes". 601 F.2d at 62. Neither the briefs in Sinicropi nor the cursory two-page per curiam opinion discussed either the legislative history or the decisions of this Court that mandate a de novo Federal hearing in Title VII cases. Nor was there any discussion of the seven district court opinions that had already reached a contrary result, with the four decided after Mitchell specifically distinguishing it as involving section 1981 rather than Title VII.*

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* See Gavin v. Peoples Natural Gas Co., 464 F. Supp. 622 (W.D. Pa. 1979), vacated and remanded on other grounds, 613 F.2d 482 (3d. Cir. 1980); Kremer v. Chemical Construction Corp., 464 F. Supp. 468 (S.D.N.Y. 1978) (Pierce, J.); Nickel v. Highway Industries, Inc., 441 F. Supp. 477 (W.D.

Armed with the Sinicropi decision, respondent Chemico renewed its motion to dismiss Mr. Kremer's complaint in the district court. In an opinion that urged the overruling of Sinicropi and that was highly critical of both Mitchell and Sinicropi, Judge Sofaer nevertheless found that "Sinicropi permits no choice" but to grant respondent's motion. 477 F. Supp. 587, A. 12. He added that "[t]o submit to . . . Sinicropi . . . is not to agree with [it]", that its conclusion "seems fanciful", that it "judicially revis[ed]" Title VII, and that its result would be to increase the burden on the Federal courts while, at the same time, undermining state antidiscrimination efforts. Id. at 591-593, A. 17-23.

Represented by counsel on appeal to the Second Circuit, petitioner urged that Sinicropi be overruled. Alternatively, he argued that it should be given prospective effect only, so that it would not apply where, as here, the state court appeal occurred before it was decided. The court of appeals panel refused to reconsider Sinicropi. 623 F.2d 786, 788, A. 04-05. On the retroactivity claim, it held that, despite the consistent line of district court decisions

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Wis. 1977); Al-Hamdani v. State University of New York, 438 F. Supp. 299 (W.D.N.Y. 1977); Beck v. Mather, 417 F. Supp. 648 (W.D. Va. 1976); Benneci v. Dep't of Labor, 388 F. Supp. 1080 (S.D.N.Y. 1975); Young v. South Side Packing Co., 369 F. Supp. 59 (E.D. Wis. 1973).

The Sinicropi court also ignored the commentators who sharply criticized extending Mitchell to Title VII actions. See e.g., Comment, State Appellate Court Judgment on Employment Discrimination is Res Judicata in Subsequent Federal Action Under Section 1981, 62 MINN. L. REV. 987 (1978); Note, 'Twas a Nibble and Not a Bite: Res Judicata and Section 1981, 53 N.Y.U. L. REV. 187 (1978).

holding that state court appeals did not bar Title VII actions, the Mitchell decision (which specifically left the question open, 553 F.2d at 275, n.13) put litigants on notice that Title VII cases would be precluded by state appeals. Id. at 789-90, A. 08-10.

Petitioner sought rehearing en banc. He was joined by the Equal Employment Opportunity Commission, as amicus curiae, in urging that Sinicropi be overruled.* Nevertheless, rehearing en banc was denied, Judges Oakes and Newman dissenting. A. 41.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed for four reasons:

(1) it conflicts with the decisions of two other circuit courts, and at least eight district court decisions;

(2) it conflicts with this Court's interpretation of Title VII in analogous cases;

(3) as stressed by the EEOC as amicus below, it frustrates the statutory scheme of Title VII in reaching a perverse and unjust result; and

(4) as emphasized by the district court opinion and the EEOC, its practical effect will be to increase the burden on the Federal courts, and at the same time, to undermine state administrative processes.

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* As the EEOC--the agency charged by Congress with the enforcement of Title VII--contended, "Sinicropi thwarts the clear Congressional purpose of affording Title VII complainants a right to a de novo hearing in court. . . ." EEOC Amicus Brief at 6, A. 53.

A copy of the EEOC's brief in support of Mr. Kremer's petition for a rehearing en banc appears at A. 44.

1. CONFLICTS AMONG THE CIRCUITS AND IN THE DISTRICT COURTS.

It is most significant that the Second Circuit's holding in Sinicropi, applied in this case, stands alone. As the Third Circuit recognized, Sinicropi is "the only circuit court case that does not adopt the majority view". Smouse v. General Electric Co., 626 F.2d 333, 336 (3d Cir. 1980).

The courts of appeals that have had an opportunity to consider the issue in the short time since Sinicropi was decided have refused to follow its holding and criticized its reasoning. See Smouse v. General Electric Co., supra at 335-36; Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1083-84 and n.6 (8th Cir.), cert. denied, U.S. , 100 S. Ct. 2942 (1980). (These decisions are discussed in more detail at pages 10-11, 17 below.) Decisions in other circuits suggest that they, too, are unlikely to follow Sinicropi.* Thus, while the particular facts of Smouse and Gunther allowed those decisions to rest on other grounds, they create a conflict among the circuits that this Court should resolve.

In addition, at least eight district courts around the nation have reached a result contrary to Sinicropi.** In the latest such decision, the district court in Maryland squarely confronted the preclusion issue in Sinicropi. The

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* See, e.g., Weahkee v. Perry, 587 F.2d 1256 (D.C. Cir. 1978); Garner v. Giarrusso, 571 F.2d 1330 (5th Cir. 1978); Batiste v. Furnco Construction Corp., 503 F.2d 447 (7th Cir. 1974), cert. denied, 420 U.S. 928 (1975); Cooper v. Philip Morris, Inc., 464 F.2d 9 (6th Cir. 1972).

** See Kralowec v. Prince George's County, Maryland, No. W-74-1384 (D. Md. Nov. 17, 1980), and cases cited p. 6 n.* supra.

court declined to follow Sinicropi, stating that "in the absence of guidance from the Supreme Court . . . this Court will follow the better-reasoned authority exemplified by Batiste [v. Furnco Construction Corp., supra] and Gunther [v. Iowa State Men's Reformatory, supra]". Kralowec v. Prince George's County Maryland, supra, slip op. at 11.

In short, every court not bound by Sinicropi has chosen not to follow it or has adopted contrary reasoning.

2. INCONSISTENCY WITH THIS COURT'S ANALYSIS

Unanimous decisions of this Court in analogous cases--which were neither argued by the parties nor discussed by the opinion in Sinicropi--leave no doubt that when Congress enacted Title VII, it intended to grant plaintiffs the right to a de novo Federal court hearing--a right denied by the court below. See, e.g., Chandler v. Roudebush, 425 U.S. 840 (1976); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). (These decisions are discussed in more detail at pages 11-12, 15, 18 below.)

Indeed, only last term this Court expressly recognized, in a case in which there had been proceedings in both the NYHRD and the Appellate Division, that Title VII "provides a supplemental right to sue in Federal court if satisfactory relief is not obtained in state forums". New York Gaslight Club, Inc. v. Carey, 48 U.S.L.W. 4645, 4649 (June 9, 1980) (emphasis added).

3. FRUSTRATION OF STATUTORY SCHEME

a. Framework of Title VII

In enacting and amending Title VII, Congress

created a complex and carefully thought out structure for the resolution of employment discrimination claims. But when the Second Circuit decided Sinicropi, it relied solely on its reasoning in Mitchell, a section 1981 action, and gave no thought to the framework of Title VII. That framework goes far beyond the bare grant of Federal jurisdiction (now 28 U.S.C. § 1343) that is the only procedural provision dating from the Reconstruction Era statutes, such as section 1981 considered in Mitchell. The essential frameworks of the statutes--section 1981 and Title VII--are simply different.* The express Congressional grant of a de novo review right in Title VII sets it apart from section 1981 for res judicata purposes.**

"[T]he unique statutory scheme of Title VII", Gunther v. Iowa State Men's Reformatory, supra, 612 F.2d at 1084, n.6, applicable only to claims under that law, requires resort to the EEOC and to state antidiscrimination remedies. Detailed timetables for state and EEOC action are set forth. It is only after exhaustion of these remedies, intended to resolve complaints without Federal court involvement, that a

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* In sharp contrast to Title VII, section 1981 does not have the complex statutory structure, the legislative history or the judicial interpretations that establish the right to a de novo hearing under Title VII. No consideration was given during the passage of the Civil Rights Act of 1866 (of which section 1981 was a part) to the development of state antidiscrimination procedures. Thus, for example, prior recourse to state and Federal administrative remedies is not a prerequisite to bringing a Section 1981 action. See, e.g., Goss v. Revlon, Inc., 548 F.2d 405, 407 (2d Cir. 1976), cert. denied, 434 U.S. 968 (1977).

** The specific Congressional grant of a right to de novo review in Title VII overrides the more general statutory requirement of 28 U.S.C. § 1738, relied upon in Mitchell with respect to section 1981 actions, 553 F.2d at 274, that Federal courts must give full faith and credit to state court judgments.

claim may be brought to Federal court. But once the procedural prerequisites are met, "unlike other civil rights statutes, Title VII clearly provides for a de novo hearing in federal court". Id.

b. Right to a Trial De Novo.

A Title VII plaintiff has a "statutory right to attempt to establish his claim in a federal court". Alexander v. Gardner-Denver Co., supra, 415 U.S. at 56. "Congress intended Federal courts to exercise final responsibility for enforcement of Title VII." Id. Because Congress "considered the policy against discrimination to be of the 'highest priority'", id. at 47, it gave the Federal courts plenary powers to enforce Title VII, id. at 44, 47; Chandler v. Roudebush, supra, 425 U.S. at 844-845. In short, "employees are entitled under . . . Title VII . . . to . . . a trial de novo". Id.; see also Alexander v. Gardner-Denver Co., supra, 415 U.S. at 38; McDonnell Douglas Corp. v. Green, supra, 411 U.S. at 798-799.

This Court has noted that Congress in 1972 defeated attempts to give the EEOC the power to hear and determine cases, subject to judicial review. Chandler v. Roudebush, supra, 425 U.S. at 841. The EEOC may investigate claims, but whatever findings it makes are irrelevant in any subsequent suit. It strains credulity to believe that when Congress expressly rejected the notion that Federal bureaucrats could finally determine the rights of the parties, it intended to permit state bureaucrats to do so. See Voutsis v. Union Carbide Corp., 452 F.2d 889 (2d Cir. 1971), cert. denied, 406 U.S. 918 (1972), cited with approval in Alexander v. Gardner-Denver Co., supra, 415 U.S. at 49 n.11.

c. Role of State Proceedings Under Title VII.

In fact, Congress intended state proceedings to supplement rather than supplant Title VII rights. The Federal court forum is available despite resort to state procedures because Congress expressly intended "to accord parallel or overlapping remedies against discrimination", Alexander v. Gardner-Denver Co., supra, 415 U.S. at 47, and "to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes". Id. at 48. See also EEOC Amicus Brief at 10-11; A. 57-58.

The New York procedures followed in this case are precisely of the type that Congress intended to be used to supplement Title VII rights. However, Congress explicitly rejected these administrative procedures for the ultimate enforcement of Title VII.

The state proceedings begin with an administrative investigation. Only if probable cause is found and conciliation efforts fail is an adversarial hearing held. N.Y. Exec. Law § 297(4)(a) (McKinney, Supp. 1972-1980). Both the Human Rights Appeals Board and the Appellate Division have power only to determine whether the NYHRD's findings are supported by substantial evidence or are arbitrary, capricious or an abuse of discretion.* Thus, when petitioner went to the Appellate Division (incidentally, following the advice of an EEOC official that he had nothing to lose in doing so), he was, as a matter of law, merely seeking to obtain a full

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* N. Y. EXEC. LAW § 297-a(7) (McKinney 1972), A. 42; N. Y. EXEC. LAW § 298 (McKinney, Supp. 1972-1980), A. 43; CIV. PRAC. LAW § 7803(3) and (4) (McKinney 1963), A. 43.

administrative hearing. Under state law, he could not possibly have obtained a de novo judicial review. At most, the Appellate Division could have remanded to the NYHRD for further proceedings. Precisely because of its limited nature, such state judicial proceedings cannot transform an administrative investigation into the equivalent of the Federal court trial that Congress mandated.*

d. Misapplication of Res Judicata in Title VII Actions.

The issue that can be raised on appeal in the state court is not the same issue that Title VII requires the Federal court to hear de novo. As noted above, the Appellate Division can consider only the narrow question whether the NYHRD decision was arbitrary or capricious on the basis of the record developed by the agency. But the issue before a district court is different: it must determine whether there was in fact discrimination. In doing so, it must afford the opportunity for a "full scale inquiry", Voutsis v. Union Carbide Corp., supra, 452 F.2d at 893, and make a "fresh determination of the facts and issues". Weahkee v. Perry, supra, 587 F.2d at 1263. For example, a district court may not "abdicate its responsibility" to conduct a de

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* In addition, as petitioner showed below, he has not had any meaningful hearing of his claim, either in the NYHRD, in the Appellate Division, or in the EEOC. He has never had an opportunity to confront any live representatives of Chemico or to subpoena and cross-examine any of the witnesses he repeatedly identified. The Appeals Board file did not include Mr. Kremer's letter arguing his position, and the Appellate Division file did not contain the certified administrative record. Indeed, the envelope containing the Appellate Division's order was postmarked three days before the order was dated. The EEOC investigation consisted merely of examining the NYHRD file, such as it was.

novo hearing by applying a substantial evidence test. Id. at 1265; see also Interpretive Memorandum of Senators Clark and Case, 110 Cong. Rec. 7213 (1964).*

Thus, because the issue that Congress mandated the Federal courts to determine de novo under Title VII--whether there was in fact discrimination--cannot be raised in a state appeal of an agency determination, Sinicropi is both inconsistent with Congressional intent and a misapplication of the principles of res judicata.** The fact that the dismissal by the NYHRD here was "confirmed" by a state court, under an abuse of discretion standard, does not alter the strong policy considerations which dictate that petitioner is entitled to a trial de novo in Federal court.

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* It is worth noting that even if NYHRD had held a hearing on petitioner's charges, the Appellate Division would have reviewed its determination applying only the "substantial evidence" standard of review. N.Y. EXEC. LAW § 297 (McKinney 1972 and Supp. 1980). The fact that (as noted in the text) a Federal court must conduct a de novo inquiry into the facts, rather than apply the lesser substantial evidence test, further demonstrates the inadequacy of the state court review in a Title VII action.

** The fact that the same "issue" that must be heard in Federal court was initially presented to the NYHRD cannot be determinative, since Title VII always requires resort to the state agency; thus, the issue presented to the state agency is necessarily identical to the one before the Federal court. But, of course, state agency determinations do not have res judicata effect. See Benneci v. Department of Labor, supra, 388 F. Supp. at 1082; Mitchell v. National Broadcasting Corp., supra, 553 F.2d at 278-80 (Feinberg, J., dissenting). If petitioner were seeking review of the single issue that was actually litigated in state court--whether the NYHRD determination was arbitrary or capricious or an abuse of discretion--he might be estopped from commencing a Federal action on that issue. But that is, of course, not the issue on which he seeks a Federal court hearing.

Even if, however, the application of res judicata had been technically correct, its use should still have been rejected in this case.

Res judicata is a flexible, equitable doctrine.*

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* So is the doctrine of retroactivity. The court below rejected petitioner's argument that Sinicropi, if not overruled, should be applied prospectively only, see 623 F.2d at 788, A. 06, although petitioner showed that he meets the standards governing nonretroactivity in civil cases set forth in Chevron Oil Co. v. Huson, 404 U.S. 97, 106-107 (1971). To support this conclusion, the court of appeals essentially relied only on the proposition that the result of Sinicropi was "clearly foreshadowed" by Mitchell. See 623 F.2d at 790, A. 09.

The facts simply are to the contrary.

Mitchell expressly reserved decision on the question of Title VII preclusion decided in Sinicropi. 553 F.2d at 275 n.13. When petitioner took his case to the Appellate Division, there were consistent, explicit holdings on this question by district courts across the country. See p. 6 n.* supra. While the dissenting opinion in Mitchell argued that the same result would follow in Title VII cases, litigants were entitled to rely upon the well-reasoned district court decisions that distinguished Mitchell, rather than upon a dissent that--like Sinicropi--did not even discuss the distinctions between Title VII and section 1981. Indeed, it is exalting form beyond all reasonable bounds to say that a pro se litigant should have anticipated the result in Sinicropi when a United States District Judge in this very case concluded, after lengthy analysis, that Mitchell did not control. Kremer v. Chemical Construction Corp., supra, 464 F. Supp. 487 (Pierce, J.), A. 28. Indeed, no one, least of all the agencies charged with the enforcement of Title VII, foresaw Sinicropi. As Judge Sofaer noted:

> "Indeed, in cases such as the present one, the state and federal agencies handling civil rights claims have uniformly assumed that federal review remained available under Title VII irrespective of prior proceedings. . . . There seems little equity in imposing a rule of forfeiture upon applicants such as Kremer under circumstances where even the expert agencies could not have anticipated one. . . . [I]ndividuals who sought review in state court prior to Sinicropi have lost their right to federal court consideration of an important federal claim without notice or fault." 477 F. Supp. at 593, A. 23-24.

The retroactivity decision is "a pragmatic one", Zweibon v. Mitchell, 606 F.2d 1172, 1177 (D.C. Cir. 1979), which is governed by "the plainest principles of justice". Gelpcke v.

It is not "rigidly applied", but is "qualified or rejected when [its] application would contravene an overriding public policy". Tipler v. E.I. du Pont de Nemours & Co., 443 F.2d 125, 128 (6th Cir. 1971). Accord, Brown v. Felsen, 442 U.S. 127, 132 (1979); 1B Moore's Federal Practice ¶ 0.405 at 783-791 (1974). Title VII implements just the sort of "overriding public policy" that limits the application of res judicata. Cf. Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977). Indeed, Alexander v. Gardner-Denver Co., supra, is itself the best example of how the express mandates of Title VII override otherwise clear Federal policies barring relitigation of claims. There, this Court held that an employee's submission of a discrimination claim to arbitration under a labor contract did not preclude a Title VII action based on the identical facts. This Court pointed out that Title VII grants "a statutory right independent of the arbitration process", id. at 54, and therefore gives the employee what is, in effect, an additional right to a hearing. If the strong Federal policy favoring final arbitration of labor

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City of Dubuque, 1 Wall. (68 U.S.) 175, 206 (1863). The guiding principle "is to avoid unfairness to parties who may have acted in reliance on the old rule". Dasho v. Susquehanna Corp., 461 F.2d 11, 921 (7th Cir.) (Stevens, J.), cert. denied, 408 U.S. 925 (1972). See Chevron Oil Co. v. Huson, supra.

Notwithstanding these principles, the court of appeals applied Sinicropi retroactively here. 623 F.2d at 788, A. 06. Under all of the circumstances, the "plainest principles of justice" dictate a contrary result. To "avoid unfairness" to petitioner, who was, in effect, relying on "the old rule", Sinicropi should not be applied in this case. For this reason, the retroactivity issue has been raised as the second question presented by this petition, although it need not be reached, of course, if the first question is resolved in petitioner's favor.

disputes was insufficient to outweigh the policy of Title VII mandating a de novo Federal hearing in Alexander, that same Title VII policy must require a de novo Federal hearing in this case, notwithstanding petitioner's resort to state antidiscrimination procedures.

* * *

It is clear that the Sinicropi decision--without argument or discussion of the issue--mistakenly equated Title VII and section 1981 for res judicata purposes. In doing so, it ignored major differences in the legislative history and structure of the two statutes, as well as unanimous decisions of this Court. For these reasons, as noted above, other circuit courts have without hesitation refused to follow Sinicropi.

The Third Circuit in Smouse v. General Electric Co., supra, stated unequivocally that

> "[G]iven our analysis of Title VII and its objective, we cannot agree that a state determination at any stage is an absolute bar to a Title VII action. To the extent that Sinicropi's reasoning may be inconsistent with our own, we decline to adopt it." 626 F.2d at 336.

In Gunther v. Iowa State Men's Reformatory, supra, the Eighth Circuit, in its discussion of Sinicropi, stated that

> "[T]here are several bases to distinguishing between section 1981 and Title VII with regard to the application of res judicata. . . .[W]e agree with these courts [that declined to extend Mitchell to Title VII actions] that the unique statutory scheme of title VII supports the proposition that res judicata and collateral estoppel should not be applied". 612 F.2d at 1084, n.6.

4. HARMFUL IMPACT ON THE JUDICIAL SYSTEM

As the EEOC and both district court opinions recognized, if the decision below stands, no well-informed litigant will appeal NYHRD determinations to the Appellate

Division.* This would thwart the intent of Congress in enacting Title VII to give states the opportunity to remedy employment discrimination claims before the Federal system acts, and will cause two unfortunate results. First, the Federal court docket will be burdened with de novo hearings of all cases that are now disposed of by the state courts. Their numbers could well exceed the number of Federal cases that can be dismissed on res judicata grounds under Sinicropi, as plaintiffs quickly learn to avoid state appeals. This Court specifically addressed this policy issue in Alexander, concluding that "the possibility of voluntary compliance or settlement of Title VII claims would . . . be reduced [by giving arbitral decisions res judicata effect], and the result could well be more litigation, not less". 415 U.S. at 59.

The second result of Sinicropi will be a deterioration of the state administrative process. Since plaintiffs who wish to preserve Federal hearing rights will no longer appeal to the state courts, those courts will have less opportunity to oversee state administrative agencies. The resulting decline in the quality of state agency process is hardly consistent with notions of comity and federalism. See Kremer v. Chemical Construction Corp., supra, 477 F. Supp. at 592-593, A. 21-23.

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* See EEOC Amicus Brief at 6, 14-15, A. 53, 61-62; 477 F. Supp. at 592-594, A. 22-25; 464 F. Supp. at 475, A. 37-38.

CONCLUSION

The decision below is inconsistent with the purpose and structure of Title VII, with this Court's decisions and with the decisions of other courts of appeals. The petition for a writ of certiorari should be granted and the judgment reversed.

Dated: January 13, 1981

Respectfully submitted,

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APPENDIX

Kremer v. Chemical Construction Corp.,

623 F.2d 786 (2d Cir. 1980)

Rubin Kremer, Plaintiff-Appellant,
v.
Chemical Construction Corporation,
Defendant-Appellee.

No. 773, Docket 79-7748.

United States Court of Appeals,
Second Circuit.

Argued March 12, 1980.

Decided June 2, 1980.

Before LUMBARD, FRIENDLY and MESKILL, Circuit Judges.

FRIENDLY, Circuit Judge:

Plaintiff Rubin Kremer was employed as an engineer by defendant Chemical Construction Corporation (Chemico). He was laid off, along with a number of other employees, on August 1, 1975. Some of these employees were later rehired but Kremer was not, despite several applications. He claims that the termination and failure to rehire were due to his being of the Jewish faith; Chemico asserts it was due to legitimate business reasons.

Mr. Kremer filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC) under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b), on May 6, 1976. The EEOC, as required by 42 U.S.C. § 2000e-5(c), referred his complaint to the New York State Division of Human Rights (NYHRD). NYHRD conducted an investigation

which included examination of documents submitted by Chemico and three interviews with Mr. Kremer. On March 4, 1977, he requested the EEOC to undertake an investigation in light of the lack of progress by NYHRD. On April 28, 1977, NYHRD issued a Determination After Investigation which stated there was no probable cause to believe that Chemico had engaged in the discriminatory practice charged. Mr. Kremer appealed to the Appeal Board pursuant to N.Y. Executive Law § 297-a on both substantive and procedural grounds, and argued his case both orally and in writing. The Appeal Board affirmed the determination of the Division. Attached to the order of the Appeal Board was a notice that any complainant, respondent or other person aggrieved by the order might obtain judicial review by filing a proceeding in the appropriate Appellate Division within 30 days of service of the order.

Mr. Kremer again brought his complaint to the attention of the EEOC by letter dated December 4, 1977, and also filed, on December 6, 1977, a petition with the Appellate Division of the Supreme Court of New York for the First Department pursuant to § 298 of the N.Y. Human Rights Law and CPLR Article 78 to set aside the adverse determination of the NYHRD. On February 27, 1978, the Appellate Division unanimously ordered that the determination of the Appeal Board be confirmed. Mr. Kremer did not endeavor to obtain review by the New York Court of Appeals. The District Director of the EEOC on May 11, 1978, made a determination concluding that there was not reasonable cause to believe that the charge of discrimination was true and issued a notice of right to sue in a United States district court. After the District Direc-

tor, having reviewed the case file and spoken with the investigator, denied a request for reconsideration, Mr. Kremer brought this Title VII action in the District Court for the Southern District of New York.

Chemico moved for dismissal of the complaint or summary judgment on the basis that the determination of the Appellate Division constituted a bar under the reasoning of our decision in Mitchell v. National Broadcasting Co., 553 F.2d 265 (2 Cir. 1977), where a divided panel held that a similar judgment operated as res judicata with respect to an action under 42 U.S.C. § 1981. Judge Pierce denied the motion in an opinion, 464 F. Supp. 468 (S.D.N.Y. 1978), which sought to distinguish the res judicata effect of a state court determination on an action under Title VII from that upon an action under 42 U.S.C. § 1981, a point left open in the majority opinion in Mitchell, 553 F.2d at 275 n.13. Later, after our decision in Sinicropi v. Nassau County, 2 Cir., 601 F.2d 60, cert. denied, 444 U.S. 983, 100 S.Ct. 488, 62 L.Ed.2d 411 (1979), which applied the reasoning of Mitchell to a claim under Title VII, Chemico renewed its motion to dismiss or for summary judgment. Judge Sofaer, to whom the case had been transferred, felt constrained to grant the motion but delivered a lengthy opinion, 477 F. Supp. 587 (S.D.N.Y. 1979), devoted mainly to an endeavor to show that the Mitchell and Sinicropi decisions were in error.

Appealing from the judgment of dismissal, Mr. Kremer, now represented by counsel, seeks reversal on two grounds:

One is that Sinicropi was wrongly decided; the other is that it should not be applied "retroactively."[1]

This panel cannot properly entertain the claim that Sinicropi was wrongly decided. In the absence of any decisions by the Supreme Court or our own court in the brief interval since Sinicropi was decided that would cast doubt on its viability, and none has been called to our attention, a panel of this court will not overturn a recent decision of another panel, rendered after full consideration of the very point at issue. This is something to be done, if at all, only by the full court sitting en banc. See United States v. Fatico, 603 F.2d 1053, 1058 (2 Cir. 1979), cert. denied, U.S. , 100 S.Ct. 1018, 62 L.Ed.2d 755 (1980); Ingram v. Kumar, 585 F.2d 566, 568 (2 Cir. 1978), cert. denied, 440 U.S. 940, 99 S.Ct. 1289, 59 L.Ed.2d 499 (1979); In re Jaylaw Drug, Inc., 621 F.2d 524, 527 (2 Cir. 1980); contrast United States v. Taylor, 464 F.2d 240, 242-44 (2 Cir. 1972) (1944 decision which was no longer being followed in practice; overruling opinion circulated to and approved by all judges in active service); Benjamins v. British European Airways,

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[1] While neither Judge Sofaer's opinion nor the brief of counsel for Mr. Kremer suggested that Sinicropi was distinguishable, at the oral argument there was some discussion of a possible distinction on the basis that Mr. Kremer had gone initially to the EEOC and was sent to the New York administrative agency by it pursuant to the deferral provision of 42 U.S.C. § 2000e-5(c), whereas Ms. Sinicropi began her proceeding in the NYHRD. Although this may make Mr. Kremer's case somewhat more attractive, we do not think the distinction has legal significance. Ultimately both claimants brought suit in a federal district court and the question is the binding effect of a determination by the Appellate Division in judicial proceedings initiated by them. If Ms. Sinicropi had gone first to the EEOC, she would have been sent to the New York administrative agency, exactly as was Mr. Kremer.

572 F.2d 913, 916-17 (2 Cir. 1978), cert. denied, 439 U.S. 1114, 99 S.Ct. 1016, 59 L.Ed.2d 72 (1979) (reconsideration by panel of two cases decided in the 1950's which appeared inconsistent with more recent decisions on a related subject); Boothe v. Hammock, 605 F.2d 661, 664 (2 Cir. 1979) (intervening Supreme Court decision).[2] We can be confident that the full court will have an opportunity to overrule Sinicropi if it wishes since counsel for Mr. Kremer advised us that he would seek rehearing en banc if we should affirm.[3]

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[2] This is the rule in other circuits as well. See, e.g., United States v. Caldwell, 543 F.2d 1333, 1369 (D.C. Cir.), cert. denied, 423 U.S. 1087, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976) (on petition for rehearing); United States v. Inmon, 594 F.2d 352, 354 (3 Cir.), cert. denied, 444 U.S. 859, 100 S.Ct. 121, 62 L.Ed.2d 78 (1979); United States v. Lewis, 475 F.2d 571, 574 (5 Cir. 1973); Timmreck v. United States, 577 F.2d 372, 376 n.15 (6 Cir. 1978), rev'd on other grounds, 441 U.S. 780, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979); cf. Rules of the United States Court of Appeals for the Seventh Circuit, Rule 16 ("A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court . . . shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear in banc the issue of whether the position should be adopted."). The only contrary expression we have found is in Speigner v. Jago, 603 F.2d 1208, 1212 n.4 (6 Cir. 1979), cert. denied, U.S. , 100 S.Ct. 1023, 62 L.Ed.2d 758 (1980) ("it would be a waste of judicial time and resources to automatically require an en banc hearing each and every time this Court overrules or modifies one of its previous decisions"). As noted, en banc rehearing is not required "each and every time" a previous panel decision is modified, but only when the basis for overruling the previous decision is simply that it is wrong although nothing new has occurred to show it to be so. The views expressed in Speigner were those of Judge Peck alone, since Chief Judge Edwards concurred separately, not finding it necessary to overrule the precedent in question, id. at 1215 n.1, and Judge Weick dissented, partly on the ground that "[n]o panel of this Court has the power or right to overrule the decision of another panel." Id. at 1217. For an illustration of the difficulties that can arise from panels taking divergent courses, see Davis v. United States, 417 U.S. 333, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974).

[3] Rehearing en banc was denied in Sinicropi itself when no active judge or judge who was a member of the panel requested that a vote be taken pursuant to a petition for rehearing en banc.

We likewise reject the alternative argument that the Sinicropi decision should not be applied to this case because Mr. Kremer brought his proceeding in the Appellate Division a year and a half before it was rendered. "The general rule of long standing is that judicial precedents normally have retroactive as well as prospective effect." National Association of Broadcasters v. FCC, 554 F.2d 1118, 1130 (D.C. Cir. 1976). To this general rule the Supreme Court has announced an exception which was defined, with respect to civil cases, in Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971):

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, e.g., Hanover Shoe Inc. v. United Shoe Machinery Corp., supra, [392 U.S. 481] at 496, [88 S.Ct. 2224, 20 L.Ed.2d 1231] or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., Allen v. State Board of Elections, supra, [393 U.S. 544] at 572 [89 S.Ct. 817, 22 L.Ed.2d 1]. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purposes and effect, and whether retrospective operation will further or retard its operation." Linkletter v. Walker, supra, [381 U.S. 618] at 629 [85 S.Ct. 1731, 14 L.Ed.2d 601]. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court

could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." Cipriano v. City of Houma, supra, [395 U.S. 701] at 706 [89 S.Ct. 1897, 23 L.Ed.2d 647].

Although the Court was not obliged to decide in Chevron whether it was necessary to pass each of these hurdles to secure a denial of retrospectivity, since it found all the required factors were present, the courts of appeals have held that unless the first factor is satisfied, there is no occasion to consider the other two. United States v. Bowen, 500 F.2d 960, 975 & n.1 (9 Cir. 1974), aff'd, 422 U.S. 916, 95 S.Ct. 2569, 45 L.Ed.2d 641 (1975); Ferguson v. United States, 513 F.2d 1011, 1012 (2 Cir. 1973); Jordan v. Weaver, 472 F.2d 985, 996 (7 Cir. 1973), rev'd on other grounds sub nom. Edelman v. Jordan, 415 U.S. 651, 658-59 n.7, 94 S.Ct. 1347, 1353-54, 39 L.Ed.2d 662 (1974). This finds support not only in the language of the Chevron opinion itself, 404 U.S. at 106, 92 S.Ct. at 355 ("the decision to be applied nonretroactively must establish a new principle of law") (emphasis supplied), see Jordan v. Weaver, supra, 472 F.2d at 996, but also by other Supreme Court decisions analyzing questions of retrospectivity. See, e.g., Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 499, 88 S.Ct. 2224, 2234, 20 L.Ed.2d 1231 (1968) (decisions applied retrospectively because they "did not constitute a sharp break in the line of earlier authority or an avulsive change which caused the current of the law thereafter to flow between new banks"); Desist v. United States, 394 U.S. 244, 248, 89 S.Ct. 1030,

1032, 22 L.Ed.2d 248 (1969) (retrospectivity analysis appropriate where decision was "a clear break with the past"); Gosa v. Mayden, 413 U.S. 665, 673, 93 S.Ct. 2926, 2932, 37 L.Ed.2d 873 (1973) (same for "a decisional change in attitude that had prevailed for many decades"). Six months after writing Chevron, Justice Stewart wrote that "[a]n issue of the 'retroactivity' of a decision of this Court is not even presented unless the decision in question marks a sharp break in the web of the law." Milton v. Wainwright, 407 U.S. 371, 381 n.2, 92 S.Ct. 2174, 2180, 33 L.Ed.2d 1 (1972) (Stewart, J., dissenting; the majority did not reach the issue). See generally Beytagh, Ten Years of Non-Retroactivity: A Critique and A Proposal, 61 Va. L. Rev. 1557, 1582-83, 1608-09 (1975). Any broader reading of Chevron would require courts to engage in the balancing process demanded by the second and third factors whenever a recognized legal principle, here res judicata, had been applied--or not applied--to a situation not precisely covered by previous decisions.

Under the first Chevron test it is not sufficient that the decision determines a point of law on which the court had not previously passed. In order to invoke nonretroactivity the decision must have established "a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed." Chevron, supra, 404 U.S. at 106-07, 92 S.Ct. at 355. Sinicropi certainly did not overrule a "clear past precedent on which litigants may have relied." Prior to Mitchell, as shown by Judge Feinberg's dissent, 553 F.2d at

277-80, the application of state decisions to actions under various federal civil rights statutes as res judicata in general and under 28 U.S.C. § 1738[4] in particular was an area of considerable turmoil. The specific question decided in Sinicropi was expressly left open in Mitchell, supra, 553 F.2d at 275 n.13, which was decided some time before Mr. Kremer took his case to the Appellate Division. There was thus nothing on which Mr. Kremer could have relied since Mitchell "clearly foreshadowed" Sinicropi. While, as stated, the Mitchell majority left the point open, its reasoning, 553 F.2d at 275-76, dictated the Sinicropi result. See Shea v. City of St. Paul, 601 F.2d 345, 351 (8 Cir. 1979). Judge Feinberg made this a principal ground of his Mitchell dissent, 553 F.2d at 278, and joined in the per curiam panel opinion in Sinicropi which stated "we all believe that the reasoning of that [the Mitchell] decision controls this one." Against all this it is of no moment that at the time Mr. Kremer resorted to the Appellate Division there were five

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[4] This reads:

> The Acts of the legislature of any State, Territory or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

district court decisions,[5] two in this circuit, which held that an adverse state judicial decision in a proceeding initiated by the plaintiff did not bar a Title VII action. See Cates v. Trans World Airlines, Inc., 561 F.2d 1064, 1072-74 (2 Cir. 1974).

We add that if it were necessary to consider the second and third Chevron factors, our conclusion would not be different. Retrospective application of Sinicropi would surely further rather than retard the operation of a principle designed to prevent relitigation in the federal courts of issues already determined by the state courts. The third factor likewise is not met. A litigant represented by counsel would have known, even before Mitchell and surely thereafter, that going from the state administrative agency to the state courts involved serious risk of the application of res judicata if the state court decision was adverse. No one contends that Mr. Kremer, who was acting pro se, had any knowledge of the district court decisions, or, for that matter, of Mitchell.[6] It cannot therefore be said that liti-

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[5] Young v. South Side Packing Co., 369 F. Supp. 59 (E.D. Wis. 1973); Benneci v. Dep't of Labor, 388 F. Supp. 1080 (S.D.N.Y. 1975); Beck v. Mather, 417 F. Supp. 648 (W.D. Va. 1976); Al-Hamdani v. State University of New York, 438 F. Supp. 299 (W.D.N.Y. 1977); Nickel v. Highway Industries, Inc., 441 F. Supp. 477 (W.D. Wis. 1977). Only the latest two of these decisions, in addition to Judge Pierce's opinion in this case, supra, 464 F. Supp. 468, were decided after Mitchell.

[6] Some point is made that the notice given to Mr. Kremer by the Appeal Board of his right to obtain review in the Appellate Division may have misled him as to the consequences of failure in that court on a Title VII action. The notice was a commendable effort to inform Mr. Kremer of his rights under New York law; the Appeal Board was under no obligation to go further.

gants in Mr. Kremer's position had any justifiable reliance interest which it would be inequitable to violate by retrospective application of Sinicropi. See Dasho v. Susquehanna Corp., 461 F.2d 11, 21 (7 Cir.), cert. denied, 408 U.S. 925, 92 S.Ct. 2496, 33 L.Ed.2d 336 (1972) (guiding principle is "to avoid unfairness to parties who may have acted in reliance on the old rule").

The judgment is affirmed.

Kremer v. Chemical Construction Corp.,

477 F. Supp. 587 (S.D.N.Y. 1979) (Sofaer, J.)

Rubin KREMER, Plaintiff,

v.

CHEMICAL CONSTRUCTION CORP., Defendant.

No. 78 Civ. 3182.

United States District Court, S. D. New York.

Sept. 20, 1979.

As Amended Oct. 2, 1979.

OPINION

SOFAER, District Judge:

This is an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. Plaintiff Kremer claims he was discharged and has not been rehired by defendant Chemical Construction Corp. (Chemico) because of his religion (Jewish) and national origin. He filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC) on May 6, 1976. EEOC referred the matter to the New York State Division of Human Rights (NYHRD), as mandated. 42 U.S.C. § 2000e-5(c). NYHRD concluded that plaintiff had failed to establish probable cause to believe that Chemico had engaged "in the unlawful discrimination practice complained of," and made findings that

plaintiff had not been rehired for lawful reasons.[1] No express findings were made with respect to Kremer's initial discharge.[2] The papers filed by Kremer indicate, however, that the evidence of discrimination on rehiring is more substantial than the evidence advanced on the illegality of the initial discharge. The NYHRD seems therefore to have impliedly rejected plaintiff's additional claims. On November 25, 1977, the NYHRD's determination was upheld by its Appeal Board as "not arbitrary, capricious or an abuse of discretion."

Plaintiff then appealed to the Appellate Division, First Department, for a judgment pursuant to § 298 of the Human Rights Law and pursuant to CPLR Article 78. He offered all the evidence and arguments there that he has most recently advanced in this court. The decision was unanimously "confirmed" by five Justices on February 27, 1978. Plaintiff again petitioned the EEOC for relief. On May 11, 1978, the EEOC found no probable cause to believe

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[1] The determination recited:

> The record shows that this complainant was not rehired by the respondent employer because one employee with greater seniority was chosen.
>
> The other person that was rehired, [sic] filled a lesser position than that held by complainant.
>
> Complainant's creed, or age, was not a factor in these selections.
>
> The complaint is therefore ordered dismissed, and the file is closed.

"Determination after Investigation," NYHRD, April 28, 1977, Exhibit C, Defendant's Motion to Dismiss, Sept. 5, 1978.

[2] Id., Exhibit C.

plaintiff's claims, but it confirmed (on the usual printed form) a right to "pursue this matter further, if so desired, by filing a private action in Federal District Court within 90 days."[3] This action followed.

Chemico has argued from the outset of this litigation that plaintiff's Title VII claims are barred by res judicata. Defendant formally moved for dismissal on September 5, 1978, basing its argument primarily on Mitchell v. National Broadcasting Co., 553 F.2d 265 (2d Cir. 1977). Mitchell was an action under 42 U.S.C. § 1981 by a black woman claiming racial discrimination by her employer. Like Kremer, she was denied relief by the NYHRD, unsuccessfully sought review by its Appeal Board, and then applied to the Appellate Division, First Department, which unanimously confirmed. Mitchell thereafter applied to the EEOC. After the EEOC found no probable cause, she sued in federal court under 42 U.S.C. § 1981. The only significant difference, therefore, between Mitchell and the present case is that plaintiff Kremer sues in the federal courts under Title VII, whereas Mitchell sued under § 1981.

The Second Circuit held in Mitchell that a federal action under § 1981 was barred under principles of res judicata. In so holding, the court found it necessary to distinguish its earlier decision in Voutsis v. Union Carbide Corp., 452 F.2d 889 (2d Cir. 1971), cert. denied, 406 U.S. 918, 92 S.Ct. 1768, 32 L.Ed.2d 117 (1972), which held that resort to a state agency to test a racial discrimination claim does not bar a subsequent federal suit

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[3] Id., Exhibit H.

under Title VII.[4] Because the plaintiff in Mitchell had gone one step beyond the state agency level by seeking limited review in the state courts by way of an Article 78 proceeding, a majority of the Second Circuit panel concluded that the state decision should be accorded the same res judicata effect it would have in the New York State courts.[5]

The plaintiff in Mitchell, though suing under § 1981, argued that to apply res judicata to her case would conflict with the legislative scheme of Title VII. But the court disagreed. The federal interest in encouraging deferral of civil rights claims to state adjudication applied only, the court found, to state agencies where conciliation of civil rights claims is attempted. "Once review of a state agency determination is sought in the state courts, however, these considerations disappear." 553 F.2d at 275. This result, the court stated, allows state agencies to apply their expertise in discrimination claims and at the same time affords a federal remedy to claimants who choose to sue in the federal courts rather than seek review in the state courts. Id. at 265.

Judge Feinberg dissented in Mitchell. He concluded that if res judicata applied in an action under 42 U.S.C. § 1981, it should also apply to a claim under Title VII, a result he found unacceptable. He reasoned

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[4] In Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974), the Supreme Court cited the Voutsis decision with approval, noting that "[m]ost courts have recognized that the doctrine of election of remedies does not apply to suits under Title VII", at 49 n. 11, 94 S.Ct. at 1020. See also Cooper v. Philip Morris, Inc., 464 F.2d 9 (6th Cir. 1972).

[5] Because Mitchell sought relief in the federal court on the same grounds as in the state court, the court reasoned that she had had her "day in court." The fact that no opportunity for a formal evidentiary hearing had been afforded did not, in the court's view, preclude application of res judicata so long as there was an identity of issues and the plaintiff had had the right to appear and an opportunity to be heard. 553 F.2d at 271.

that, since Congress had provided for a de novo hearing of all Title VII cases in the federal courts after both state and federal agency determinations, it made no sense to deprive a complainant of de novo review because he or she pursued an additional, limited review in the state courts. He noted that Congress had provided in civil rights cases for considerable duplication and overlapping of remedies, and that this legislative purpose should not be overridden by judicial resort to the normal but inapposite policy against repetitious litigation. Id. at 277-80; see 28 U.S.C. § 1738.

Despite Mitchell, defendant's motion to dismiss in this case was denied by Judge Lawrence W. Pierce on December 7, 1978.[6] Judge Pierce essentially adopted Judge Feinberg's reasoning in Mitchell, but concluded that the specific statutory grant of de novo federal review in Title VII justified distinguishing, for res judicata purposes, cases under Title VII from cases under the other civil rights statutes. He agreed also with Judge Whitman Knapp's opinion in Benneci v. Department of Labor, 388 F.Supp. 1080 (S.D.N.Y.1975). To apply res judicata to Title VII cases, Judges Pierce and Knapp concluded, would defeat the general purposes of the statutory scheme as construed by a unanimous Supreme Court in Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974). "Such a holding would impliedly restrict the

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[6] Further indication of the Second Circuit's attitude on repetitious litigation was provided by the intervening decision in Winters v. Lavine, 574 F.2d 46 (2d Cir. 1978), applying collateral estoppel in an action under 42 U.S.C. § 1983.

express provision for a second independent hearing to those instances where state proceedings had been terminated without state court review. There being no limitation of this nature on the availability of a de novo hearing imposed by Congress, the insertion of a qualification by judicial fiat is unwarranted." Kremer v. Chemical Construction Co., 464 F.Supp. 468, 473 (S.D.N.Y.1978).

On June 12, 1978, however, the Second Circuit extended the Mitchell rule to Title VII cases. In a per curiam opinion, it held that res judicata would bar a Title VII claim where the plaintiff had previously sought state court review on the same question presented to the federal courts. The panel saw "no reason to distinguish between Section 1981 and Title VII for res judicata purposes." Without discussion of the de novo review requirement of Title VII, Mitchell was deemed to control. "The crucial factor is that appellant chose to submit her case to the state courts for review and she cannot now relitigate the same issues in federal court." Sinicropi v. Nassau County, 601 F.2d 60 at 62 (2d Cir. 1979). (Emphasis in original.) Judge Feinberg, who dissented in Mitchell, agreed its reasoning required dismissal of Title VII cases, as he had predicted.

Sinicropi permits no choice but to dismiss plaintiff's complaint in this case on grounds of res judicata. Plaintiff urges what he regards as distinguishing features: perfunctory treatment by the NYHRD and an order by the Appellate Division that misleads by reciting that plaintiff appeared and argued in his behalf. These deficiencies, however, are less substantial than--though

similar to--the deficiencies raised by the plaintiff in Mitchell. See 553 F.2d at 268 (lack of witnesses, no cross-examination, no counsel). Nor is it significant that the NYHRD's opinion expressly refers only to the plaintiff's claim based on defendant's failure to rehire him; the papers indicate that both the agency and the state court were presented with all aspects of plaintiff's claim of religious discrimination--identical to the claim presented in this court--and they denied relief.

To submit to Mitchell and Sinicropi, however, is not to agree with them. The Mitchell majority's conclusion that Title VII's de novo review is satisfied by a combination of an agency finding of no probable cause coupled with Article 78 review seems fanciful. No amount of judicial explication can alter the reality that a litigant who pursues his civil rights claim in a state court with limited powers of review loses his statutory right to full review in the federal courts. This disparity in remedial opportunity is merely obfuscated by the assertion that agency consideration of probable cause coupled with limited Article 78 review is equivalent to a summary judgment proceeding in federal court and thus satisfies the de novo review requirement. It is well settled that in considering a Title VII claim a federal district court is not bound by administrative findings of fact. Chandler v. Roudebush, 425 U.S. 840, 844-45, 96 S.Ct. 1949, 48 L.Ed.2d 416 (1976). A Title VII trial may therefore encompass anything reasonably within the scope of an EEOC investigation. See Comment, T'was a Nibble Not a Bite: Res Judicata and Section 1981--Mitchell v. National

Broadcasting Co., 53 N.Y.U.L.Rev. 187, 204-05 (1978). Whether the district court decides the claim on a motion for summary judgment or after a full trial, it is entitled to request additional affidavits and evidence and, if necessary, to hold an evidentiary hearing. See generally Wright & Miller, Federal Practice and Procedure: Civil § 2721 (1973). By contrast, the New York Appellate Division, like most appellate courts, is limited to the record of facts gathered and evidence presented in the agency proceedings. Comment, State Appellate Court Judgment on Employment Discrimination is Res Judicata in Subsequent Federal Action Under Section 1981 of the Civil Rights Act of 1866, 62 Minn.L.Rev. 987, 1006 (1978). As a result, the appellate court determination is subject to all the procedural infirmities of the administrative proceeding.

Even if state agency and appellate court review were considered sufficiently analogous to federal summary judgment in the abstract, res judicata would still appear an inappropriate mechanism to bar Title VII claims in the federal courts. As the Second Circuit stated in Voutsis, supra, "[a] federal claim allows the district court to conduct a 'full scale inquiry into the charged unlawful motivation in employment practices'", 452 F.2d at 893, quoting Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 715 (7th Cir. 1969). Such a full scale inquiry will often call for a trial on the merits, including independent fact-finding by the federal court. The Mitchell majority correctly argued, of course, that a federal court is empowered to use a summary judgment procedure in all cases where no genuine issue of material fact is presented;

in such cases the issues considered in the federal review would be quite similar to the issues considered when a state court "confirms" as reasonable an agency's dismissal for lack of probable cause. But there is a critical difference between the authority of the New York and federal courts in dealing with Title VII issues. A federal court is permitted to make a summary judgment disposition of an employment discrimination case. By contrast, the New York Appellate Division in an Article 78 proceeding is restricted to using a proceeding similar to summary judgment; it has no authority to determine whether summary judgment is, in a given case, preferable to a full judicial trial on the merits.[7] For this reason, the issues presented

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[7] See generally Comment, Civil Rights--Civil Procedure: State Appellate Court Judgment on Employment Discrimination is Res Judicata in Subsequent Federal Action Under Section 1981 of the Civil Rights Act of 1866, supra, at 988 nn. 5 & 6. The Appeal Board reviews dismissals for lack of probable cause only to determine whether the action of the NYHRD was "arbitrary and capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion." Mayo v. Hopeman Lumber & Mfg. Co., 33 A.D.2d 310, 313, 307 N.Y.S.2d 691, 694, appeal dismissed, 26 N.Y.2d 962, 311 N.Y.S.2d 5, 259 N.E.2d 477 (1970). Even if the Board determines that there is a genuine factual dispute over a key issue, it may not reverse the NYHRD's dismissal for lack of probable cause. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. State Div. of Human Rights, 48 A.D.2d 391, 370 N.Y.S.2d 96 (1975) (per curiam). Nor is it empowered to find new facts. See State Div. of Human Rights v. Columbia Univ., 39 N.Y.2d 612, 616, 385 N.Y.S.2d 19, 21, 350 N.E.2d 396, 398 (1976), cert. denied, 429 U.S. 1096, 97 S.Ct. 1112, 51 L.Ed.2d 543 (1977).

The Appellate Division's scope of review in an Article 78 proceeding has been held to be no broader than that of the Appeal Board. See Mize v. State Div. of Human Rights, 33 N.Y.2d 53, 57, 349 N.Y.S.2d 364, 367-68, 304 N.E.2d 231, 233 (1973). Thus, in reviewing the state agency determinations, it seems that the Appellate Division can at most reverse and remand for a hearing or further investigation by the agency. See Mitchell, supra, 553 F.2d at 272 n. 9, citing Mayo v. Hopeman Lumber & Mfg. Co., supra.

In justifying application of res judicata in Mitchell, the majority apparently relied on the fact that Second Circuit courts have on occasion given res judicata effect to Article 78 judgments. 553 F.2d at 272 n. 9. None of the cases cited by the majority, however, involved the resolution of employment discrimination or similar claims where Congress expressly provided for de novo federal court review.

before the state court in an Article 78 proceeding and those before the federal court under Title VII are necessarily dissimilar, thus making the application of res judicata inappropriate. Given the express mandate in Title VII for federal de novo review, the federal court would appear obliged to determine independently the nature and extent of review necessary to protect a claimant from employment discrimination. Mitchell and Sinicropi foreclose the federal courts from considering this important question.[8]

A primary concern of the Mitchell majority was the need to enhance comity between the state and federal courts. Yet, as the Mitchell majority concedes, comity in our federal system must always begin with a proper implementation of our national legislature's will. Otherwise, the concept might be used to create a preference for adjudicating at least some types of federal claims in state rather than federal court. Where Congress has "long evinced a general intent to accord parallel or overlapping remedies against discrimination," Alexander v. Gardner-Denver Co., supra, 415 U.S. at 47, 94 S.Ct. at 1019, a preference for state resolution of such claims seems especially inappropriate. Furthermore, comity has generally been understood

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[8] This court concedes that it may not always be inappropriate for a federal court to give res judicata effect to a state court's disposition of an employment discrimination claim. As two commentators have persuasively argued, res judicata effect might properly be accorded when the state proceedings included a trial on the merits, or at least involved summary disposition where there was a possibility of full trial on the merits. Comment, Civil Rights--Civil Procedure: State Appellate Court Judgment on Employment Discrimination is Res Judicata in Subsequent Federal Action Under Section 1981 of the Civil Rights Act of 1866, supra, at 1012; Comment, T'was a Nibble Not a Bite: Res Judicata and Section 1981, supra, at 214.

to require deference to state decisions based on the same scope of review applied in comparable federal proceedings. It seems a strange version of comity to require a federal court to relinquish an obligation to grant de novo review on the ground that a state court has granted limited review of a state agency decision. One wonders, moreover, why comity will be served if, as seems likely, individuals with civil rights claims will strive to avoid the state courts in order to preserve their right to a federal forum.

The Mitchell majority also wrote of the "interests of judicial husbandry," and "the equity of protecting opposing parties . . from vexatious duplicative litigation," 553 F.2d at 276-277, quoting from Thistlewaite v. City of New York, 362 F.Supp. 88, 92 (S.D.N.Y.1973), aff'd, 497 F.2d 339 (2d Cir.), cert. denied, 419 U.S. 1093, 95 S.Ct. 686, 42 L.Ed.2d 686 (1974). Even assuming an adequate basis exists for judicially revising the apparent legislative judgment as to where the balance should be struck on these interests, do considerations of judicial administration and equity truly support the application of res judicata in Title VII cases?

Title VII plaintiffs will still initially seek relief before the NYHRD because the federal statute requires them to do so. Some will still seek review in the state courts on state law grounds, carefully avoiding any mention of their federal claims even though they are before a tribunal competent to review those claims. Most will avoid the state courts entirely, thus encouraging further deterioration of the state agency process due to much less frequent state court supervision. Furthermore, by

discouraging state court review of agency decisions, Mitchell and Sinicropi may well serve to increase the number of discrimination cases brought in the federal courts. Those plaintiffs who, until Mitchell and Sinicropi, were satisfied with the handling of their claims by the state courts and sought no federal review will, after those decisions, pursue their claims in federal courts at the outset.[9] Federal courts who hear these claims will no longer have the benefit of state court decisions, which have often been of assistance.

As for the equitable consequences of Mitchell and Sinicropi, they may create far more unfairness than they avoid, and proper alternative means for avoiding vexatious, duplicative litigation seem available. First, it seems clear that many civil rights claimants have been misled by prior court decisions, such as Voutsis, into believing they could seek limited state court review without losing access to the federal courts. Indeed, in cases

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[9] Cf. Alexander v. Gardner-Denver Co., supra, where the Supreme Court expressed similar concerns in holding that federal courts should not give res judicata effect to state arbitration determinations. The Court noted that to hold otherwise

> might adversely affect the arbitration system as well as the enforcement scheme of Title VII. Fearing that the arbitral forum cannot adequately protect their rights under Title VII, some employees may elect to bypass arbitration and institute a lawsuit. The possibility of voluntary compliance or settlement of Title VII claims would thus be reduced, and the result could well be more litigation, not less. 415 U.S. at 59, 94 S.Ct. at 1025.

such as the present one, the state and federal agencies handling civil rights claims have uniformly assumed that federal review remained available under Title VII irrespective of prior proceedings. For example, after Mr. Kremer had gone to the state agency, sought state review, and then federal agency consideration, the EEOC issued a letter stating that he had a "right to sue" in federal court. There seems little equity in imposing a rule of forfeiture upon applicants such as Kremer under circumstances where even the expert agencies could not have anticipated one. Granted that the unfairness of applying res judicata to Title VII cases is lessened with respect to complainants who seek state court review after Sinicropi; yet the fact remains that the individuals who sought review in state court prior to Sinicropi have lost their right to federal court consideration of an important federal claim without notice or fault.[10]

The Mitchell and Sinicropi decisions will also have inequitable results in future cases. Undoubtedly some individuals will continue to seek review of their federal claims in state courts. These will generally be the uninformed parties who are commonly seen as pro se plaintiffs in civil rights cases. Whatever increase is attained in judicial efficiency through finalizing state court decisions is likely to be at the expense of these plaintiffs

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[10] The unfairness of applying Sinicropi to plaintiffs such as Kremer was brought home to this court when Mr. Kremer was told his complaint had to be dismissed. He was obviously shocked to discover that he had no right to federal review. He complained that he had gone through all the procedures he had been told to go through, but had never obtained a hearing on his claim.

who will not know they should avoid our sister courts. On the other hand, civil rights defendants will not really be spared vexatious, duplicative litigation by Mitchell and Sinicropi. Knowledgeable plaintiffs need dispense with only one of the several stages of litigation available to them, one which to defendants must be the least burdensome stage of all, i. e., a limited review in which the state agency joins the defendant in opposing the plaintiff's contentions.

Greater relief for vexed defendants in Title VII cases is certainly an objective the Circuit Court should strive to secure. Cases brought by individual plaintiffs seem particularly burdensome, and most often meritless. Devices are potentially available, however, that would be more effective in deterring vexatious suits and fairer to plaintiffs than applying the res judicata doctrine. Two particularly promising measures would be to encourage federal district judges to use their power to grant summary judgment on the merits, and to permit them greater authority in frivolous cases to grant costs and counsel fees against the losing plaintiff.

The right to a de novo review should not exempt civil rights claimants from the usual requisites of federal litigation, including the need to allege facts sufficient to create a genuine issue of fact as well as a legal theory upon which relief may be granted. We are perhaps too reluctant to give full weight at the pleading stage to the practical reality that, in light of the plaintiff's burden of proof, discrimination cases based essentially on the plaintiff's feelings or suspicions often fail to raise

issues of fact worth litigating.[11] Indeed, greater use of summary judgment in employment discrimination cases finds support in the Mitchell decision itself. If the court there was willing to give full faith and credit to a state procedure which merely resembles federal summary judgment, it should be even more prepared to affirm a federal district court's summary disposition of a Title VII claim, especially since the federal court is free to consider the propriety of a full trial on the merits.

We naturally resist imposing costs and fees on individuals who already carry with them, however unjustifiably in the law's eyes, a feeling of having been greatly wronged. Yet it is here that the courts must show courage and ingenuity. Instead of precluding suits under judicial doctrines such as res judicata, we should use statutorily granted powers to tax costs and fees in cases we have concluded are meritless. See 42 U.S.C. § 2000e-5(k). The Supreme Court recently confirmed the propriety of awarding attorney's fees to a Title VII defendant who prevails on the merits. Christianburg Garment Co. v. EEOC, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978). Although the Court concluded that a more stringent standard should apply to prevailing defendants than would apply to prevailing plaintiffs, the standard articulated by the Court for prevailing defendants seeking attorney's fees is far less stringent than many lower federal courts had assumed. The Supreme Court stated: "[A] district court may in its discretion award attorney's fees to a prevailing defendant

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[11] One commentator persuasively argues that, where the moving party does not have the trial burden of proof, the summary judgment evidentiary standard should be relaxed. Louis, Federal Summary Judgment Doctrine: A Critical Analysis, 83 Yale L.J. 745 (1974).

in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." 434 U.S. at 421, 98 S.Ct. at 700. With this new standard, the assessment of attorney's fees is now available as a potentially effective device for protecting defendants from the burdens of meritless civil rights claims.

The motion to dismiss is granted, and the complaint is dismissed, without costs to either side.

SO ORDERED.

Kremer v. Chemical Construction Corp.,

464 F. Supp. 468 (S.D.N.Y. 1978) (Pierce, J.)

Rubin KREMER, Plaintiff,

v.

CHEMICAL CONSTRUCTION, CORP.,
Defendant.

No. 78 Civ. 3182

United States Distict Court,

S. D. New York.

Dec. 7, 1978.

OPINION AND ORDER

PIERCE, District Judge.

The plaintiff, Rubin Kremer, instituted this pro se action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. The plaintiff alleges that the defendant, Chemical Construction Corp. ("Chemico"), both discharged him and failed to rehire him because of his religion and national origin. The defendant has moved for dismissal under Fed. R. Civ. P. 12(b) or, alternatively, for summary judgment under Rule 56 on the ground of res judicata. For the reasons that follow, the Court finds that the plaintiff is entitled to a de novo hearing on the claims presented to the Court as provided for in 42 U.S.C. § 2000e-5 and therefore denies defendant's motion.

FACTS

The plaintiff, a former employee of Chemico, alleges that he was terminated by the defendant on August 1, 1975, because of his national origin and his adherence to the Jewish religion. He also alleges that Chemico refused to rehire him later because of his national origin and religion. These alleged discriminatory acts are prohibited by both federal and state laws. 42 U.S.C. § 2000e 2(a)(1) (1970); N.Y. Exec. Law § 296(1) (McKinney Supp. 1977).[1]

The plaintiff filed a discrimination charge with the Equal Employment Opportunity Commission ("EEOC") on May 6, 1976, within the filing period. The EEOC referred the matter to the New York State Division of Human Rights ("HRD") as mandated in 42 U.S.C. § 2000e-5(c).[2] HRD is the state agency charged with the enforcement of state law prohibiting

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1. 42 U.S.C. § 2000e-2(a) provides:

> "It shall be an unlawful employment practice for an employer--(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin; . . . ."

N.Y. Exec. Law § 296(1) provides:

> "It shall be an unlawful discriminatory practice: (a) For an employer or licensing agency, because of the age, race, creed, color, national origin, sex, or disability, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual. . . ."

2. 42 U.S.C. § 2000e-5(c)

> "In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from

employment discrimination. That agency reviewed the complaint which alleged age as well as religious discrimination. New York's statute expressly prohibits age discrimination whereas Title VII does not. Compare 42 U.S.C. § 2000e-2 (a)(1) with N.Y. Exec. Law § 296(1) (McKinney Supp. 1977).

On March 4, 1977, while the matter was still pending before HRD, the plaintiff again requested EEOC to investigate his claim because of the state's delay in resolving his claims. HRD subsequently reached a determination on April 28, 1977 that the plaintiff's claims were meritless. Its determination was based on the findings that the plaintiff was not rehired because one employee who was rehired had greater seniority than the plaintiff, that another employee who was rehired filled a lesser position than that previously held by the plaintiff, and that the plaintiff's creed and age were not factors considered in Chemico's selection. HRD did not, however, make an express finding that his creed and age were not factors considered by Chemico in its decision to discharge

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> such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided..."

Also see 29 C.F.R. 1601.12(b)(1)(iii, iv) (1977)

> "The aggrieved party and any person filing a charge on behalf of an aggrieved party shall be notified, in writing, that the document which he or she sent to the Commission has been forwarded to the State or local agency. . . and that unless the Commission is notified to the contrary, on the termination of State or local proceedings, or after 60. . . days have passed, whichever occurs first, the Commission will consider the charge to be filed with the Commission and commence processing the case. . . ."

him. On administrative appeal, HRD's determination was affirmed on November 25, 1977 by the State Human Rights Appeals Board on the grounds that HRD's findings were not arbitrary or capricious.

The plaintiff then appealed the decision to the New York State Supreme Court, Appellate Division, First Department, under N.Y. Exec. Law §§ 296-298. That intermediate appellate court affirmed the decision on February 27, 1978. The matter was not appealed further.

On May 11, 1978, the EEOC reviewed the HRD's findings, the complaint, and the record and determined that there was no reasonable cause to believe that the plaintiff's claims were valid. It then issued a notice of right to sue. Plaintiff subsequently instituted this action pro se, and requested a de novo trial under Title VII.

DISCUSSION

The issue presented to the Court by the instant motion to dismiss the complaint or, in the alternative, for summary judgment is whether the prior state appellate court review of the state agency's action under state law bars a federal action under Title VII.

Chemico urges this Court to adopt the approach followed in Mitchell v. National Broadcasting Co., 553 F.2d 265 (2d Cir. 1977) and dispose of this motion similarly. In Mitchell, the plaintiff had instituted an action under 42

"Upon notification of the termination of State or local proceedings or the expiration of 60 (or 120) days, whichever occurs first, the Commission will consider the charge to be filed with the Commission and will commence processing the case."

U.S.C. § 1981, but prior to instituting the federal action, the plaintiff had brought an action under the N.Y. Human Rights Law with HRD. Only after she was denied relief and after instituting an appeal from HRD's decision with the Appeals Board did that plaintiff seek federal relief by filing a charge of discrimination with the EEOC. The EEOC issued a finding of no probable cause after HRD's determination was affirmed by the Appeals Board and the Appellate Division.

The plaintiff then instituted an action under § 1981 in federal court, but the action was dismissed on the ground of res judicata. On appeal, the Court of Appeals held that the federal action was indeed barred by res judicata because the plaintiff had sought state court review of the state agency determination. Id. at 276. However, it expressly reserved judgment on the question of whether the principle of res judicata would bar a similar action under Title VII. Id. at 275 n.13.

In comparison, the plaintiff in this action initially filed a complaint with the EEOC, was referred to HRD, and resumed his request that the EEOC investigate his charges prior to HRD reaching its conclusion. Like the complaint in Mitchell, the plaintiff, commenced this action in federal court after failing in his appeal to the state Appellate Division regarding the Appeals Board's affirmance of the HRD determination.

The similarity of the facts of the instant action to those in Mitchell, Chemico contends, is sufficient to justify a ruling similar to that in Mitchell, particularly since Title VII does not require exhaustion of state judicial remedies prior to instituting federal claims and since the

plaintiff chose not to appeal the Appellate Division's affirmance to the New York State Court of Appeals. While Title VII does require that the EEOC defer complaints to HRD, 42 U.S.C § 2000e-5(c)(1970), it does not require that complainants exhaust state judicial remedies before seeking federal relief. On the contrary, Title VII allows the filing of a complaint with the EEOC 60 days after proceedings are initiated under state law. Id. Chemico contends that if the plaintiff had sought federal relief immediately after the rulings from the HRD and from the State Appeals Board rather than appealing to the state court, his right to a de novo federal trial would have been preserved. See, Voutsis v. Union Carbide Corp., 452 F.2d 889 (2d Cir.), cert. denied, 406 U.S. 918, 92 S.Ct. 1768, 32 L.Ed.2d 117(1971); Batiste v. Furnco Construction Corp., 503 F.2d 447 (7th Cir.), cert. denied, 420 U.S. 928, 95 S.Ct. 1127, 43 L.Ed.2d 399 (1975).

In determining that state court review barred a subsequent federal court action under § 1981, the Court in Mitchell stressed that §296 of the New York Executive Law is at least as broad as the federal constitution and civil rights laws in prohibiting discrimination in employment. 553 F.2d at 269-70, that the issues addressed in the state proceedings were the same as those before the district court, id. at 270, that the standard for evaluating the plaintiff's claims under state law is comparable to that for evaluating a summary judgment motion in the federal courts, id. at 271, and that the New York state courts are not less capable than federal courts in resolving the legal sufficiency of a complaint or less sensitive to claims under the State Human Rights Law which may also be actionable under federal statute.

Id. at 276. The issue to be determined here is whether these considerations compel a finding of a similar bar of actions brought under Title VII.[3]

The principles of collateral estoppel and res judicata are made applicable to federal courts with respect to prior state court judgments by 28 U.S.C. § 1738. That statute obligates the federal courts to give full faith and credit to judgments of state courts of competent jurisdiction.[4] The federal court, however, need only give that state judgment the same effect as it would be given in the state in which it was rendered. Mitchell v. National Broadcasting Co., 553 F.2d at 274.[5] Ordinarily, this requires an analysis of the res judicata effect of the state court proceedings within the state and an examination of the local law of res judicata and collateral estoppel. Winters v. Lavine, 574 F.2d at 52 (2d Cir. 1978).

While section 1738 mandates an analysis and application of the state doctrines of res judicata and collateral estoppel, other considerations must also be evalu-

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3. A review of decisions of sister courts in other circuits has revealed sharply conflicting opinions. Compare Beck v. Mather, 417 F. Supp. 648 (W.D. Va. 1976)(prior state court dismissal not res judicata) with Bennun v. Board of Governors, 413 F. Supp. 1274 (D.N.J. 1976)(prior state court determination is res judicata).

4 28 U.S.C. § 1738 extended the Full Faith and Credit provisions of the U.S. Constitution Article 4, § 1 to all courts, federal as well as state. Davis v. Davis, 305 U.S. 32, 40, 59 S.Ct. 3, 6, 83 L.Ed. 26, 29 (1938). Also see Winters v. Lavine, 574 F.2d 46, 54 (2d Cir. 1978); American Mannex Corp. v. Rozands, 462 F.2d 688, 690 (5th Cir.), cert. denied, 409 U.S. 1040, 93 S.Ct. 524, 34 L.Ed.2d 489 (1972).

5 But see Theis, Res Judicata in Civil Rights Act Cases: An Introduction to the Problem, 70 Nw. U.L. Rev. 859, 876 "Although section 1738 counsels the federal judge to resolve all res judicata problems in all cases as would a state judge, this admonition is unrealistic and impossible when the federal judge exercises a concurrent jurisdiction granted for special reasons."

ated. As the Mitchell court noted, even if a state court's determination had a res judicata or collateral estoppel effect on other courts of that state, federal courts are not always bound by such prior state decisions. "'Other well-defined federal policies, statutory or constitutional, may compete with those policies underlying [28 U.S.C. §] 1738 [which provides that the federal courts give full faith and credit to judgments of state courts of competent jurisdiction].'" Id. at 274 (citing American Mannex Corp. v. Rozands, 462 F.2d 688, 690 (5th Cir.), cert. denied, 409 U.S. 1040, 93 S.Ct. 524, 34 L.Ed.2d 489 (1972)). Especially in civil rights actions, the res judicata and collateral estoppel requirements of § 1738 have not been rigidly applied. See Mitchell, supra at 274; McCune v. Frank, 521 F.2d 1152, 1156 n.10 (2d Cir. 1975); also see discussion in Winters, supra at 56. But the mere fact that a federal civil rights action is involved is not sufficient reason to deny a state court determination the full faith and credit required by § 1738. Mitchell v. National Broadcasting Co., supra.

Recent decisions in this circuit have supported the conclusion that state court determinations have res judicata or collateral estoppel effect on subsequent federal civil rights actions. Winters v. Lavine, supra; Mitchell v. National Broadcasting Co., supra. Winters was an action under 42 U.S.C. § 1983 (accord Hammer v. Town of Greenburgh, 440 F. Supp. 27 (S.D.N.Y. 1977)) and Mitchell was instituted under 42 U.S.C. § 1981. Several distinctions exist, however, between the statutes under which those cases were tried and Title VII. Under Title VII, the statutory prerequisite for instituting an action in federal court is that the complainant first

submit his claim to state and federal agencies. 42 U.S.C. § 2000e-5, supra. This requirement is not present under § 1981 or § 1983. The purpose of this requirement is to permit the state agency to attempt to resolve the matter under state law through voluntary conciliation and persuasion. Alexander v. Gardner-Denver, 415 U.S. 36, 44, 94 S.Ct. 1011, 1017, 39 L.Ed.2d 147, 156 (1974); 29 C.F.R. 1601-12(a)(1977). Furthermore, Title VII provides for a de novo hearing by a federal court once the statutory prerequisites have been met. The Court must be mindful of these distinctions and their implications in evaluating the applicability of the holdings in Winters and Mitchell to the action at bar and in assessing the federal policies embodied in Title VII.

A review of the history of Title VII indicates that Congress intended the policy against discrimination, as manifested in the Civil Rights Act of 1964, be given the highest priority. Newman v. Piggie Park Enterprises, 390 U.S. 400, 402, 88 S.Ct. 964, 19 L.Ed.2d 1263(1968)(per curiam). "Consistent with this view, Title VII provides for consideration of employment discrimination claims in several forums . . . . And, in general, submission of a claim to one forum does not preclude a later submission to another. Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." Alexander v. Gardner-Denver Co., 415 U.S. at 47-49, 94 S.Ct. at 1019-1020, accord, 29 C.F.R. 1601.12(a)(1977). Accordingly, Title VII actions should not be subject to the collateral

estoppel effects of section 1738 where the result would be the possible frustration of the congressional objectives embodied in Title VII, to wit, the availability of separate federal and state remedies and the independent adjudication of federal claims.

An earlier Title VII case involving circumstances similar to those presented in the action at bar discussed these policy considerations. In Benneci v. Dep't of Labor, 388 F. Supp. 1080 (S.D.N.Y. 1975), the plaintiff claimed that the defendant had engaged in unlawful employment discrimination and discriminated against him because of his religion and national ancestry in violation of New York's Human Rights Law. After HRD determined that there had been no unlawful discriminatory practice, he appealed to the Appeals Board which affirmed. Benneci then appealed to the state appellate court which also affirmed. Having failed to secure relief from the state, he filed a complaint with the EEOC. When the EEOC determined that there was no reasonable cause to believe that an unlawful practice had been engaged in, plaintiff brought his action in federal court.

In refusing to give the state court's affirmance res judicata effect, the district court judge discussed the congressional objectives embodied in Title VII. In his opinion, Judge Knapp cited the Supreme Court's unanimous decision in Alexander v. Gardner-Denver Co., supra, wherein it was noted that the purpose of Title VII was to assure equality of employment opportunities through cooperation and voluntary compliance. Title VII incorporates a procedure whereby existing state and local agencies as well as the

EEOC would have an opportunity to settle disputes before the complainant was permitted to commence an action in federal court. The court in Benneci reasoned that to grant defendant's motion for summary judgment because the plaintiff had sought to comply with these procedures would defeat the general purpose of the statutory scheme. 388 F. Supp. at 1081. Furthermore, where the complainant has manifested a preference for the federal forum by initiating his action with EEOC rather than the state agency, he may be less inclined to actively and fully pursue his state claim, as envisioned by the statutory scheme, or to seek review of arbitrary state agency actions, if a possible loss of his federal claim would result. This statutory scheme is unique to Title VII actions and manifests Congress' intent that there be an initial resort to state remedies. A bar of a federal action because of collateral estoppel may well frustrate this congressional purpose. Consequently, a complainant's resort to state court review should not bar a Title VII action as it would under other federal civil rights statutes.

A further reason for distinguishing an action under Title VII from actions under other federal civil rights statutes is that Title VII expressly provides for a de novo hearing by a federal court. Although state courts may be said to be as capable of evaluating claims of discrimination as federal courts, where the reviewing state court does not have plenary power to try the matter anew, the barring of an independent federal action on grounds of collateral estoppel would have the effect of limiting the availability of a de novo hearing. Such a holding would impliedly

restrict the express provision for a second independent hearing to those instances where the state proceedings had been terminated without state court review. There being no limitation of this nature on the availability of a de novo hearing imposed by the Congress, the insertion of a qualification by judicial fiat is unwarranted.

CONCLUSION

While Benneci was decided prior to the decision in Mitchell, the reasoning of Benneci is consistent with the later analysis of the Second Circuit Court of Appeals in Mitchell. The policy embodied in Title VII was intended to be effectuated by the entire procedure set forth in §2000e-5 including the provision for a second, independent federal hearing. Truncating the procedure on the grounds of res judicata under these circumstances is not mandated by Mitchell and would be contrary to the apparent intent of Congress.

Accordingly, the defendant's motion to dismiss or, alternatively, for summary judgment is denied.

SO ORDERED.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit held at the United States Court House, in the City of New York, on the fifteenth day of October, one thousand nine hundred and eighty.

Present:

HON. J. EDWARD LUMBARD

HON. HENRY J. FRIENDLY

JON. THOMAS J. MESKILL

Circuit Judges.

[SEAL OF United States Court of Appeals, Second Circuit Filed: Oct. 15, 1980]

Rubin Kremer, Plaintiff-Appellant v. Chemical Construction Corp., Defendant-Appellee.	79-7748 [79-7748]

A petition for a rehearing having been filed herein by counsel for the appellant Rubin Kremer,

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is denied.

/s/ A. Daniel Fusaro
A. Daniel Fusaro
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 15th day of October, one thousand nine hundred and eighty

----------X

RUBIN KREMER,

Plaintiff-Appellant,

v.

CHEMICAL CONSTRUCTION CORPORATION,

Defendant-Appellee.

----------X

[SEAL OF United States Court of Appeals Second Circuit Filed Oct 15, 1980]

79-7748

[79-7748]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, and a poll of the active judges having been taken, and there being no majority in favor thereof,

UPON CONSIDERATION THEREOF, it is

Ordered that said petition be and it hereby is DENIED.

Judges Oakes and Newman voted in favor of rehearing in banc.

/s/ Wilfred Feinberg
Chief Judge

Pertinent Parts of Statutes Involved

[42 U.S.C.] § 2000e-2. Unlawful Employment Practices--Employer Practices

"(a) It shall be an unlawful employment practice for an employer--

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or"

[42 U.S.C.] § 2000e-5. Enforcement Provisions--Power of Commission to Prevent Unlawful Employment Practices

" . . . .

"(c) In the case of an alleged unlawful employment practice occuring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated . . . ."

[N.Y. EXEC. LAW] § 296(1)(a). Unlawful Discriminatory Practices

"1. It shall be an unlawful discriminatory practice: (a) For an employer or licensing agency, because of the age, race, creed, color, national origin, sex, or disability, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual . . . ."

[N.Y. EXEC. LAW] § 297-a. State Human Rights Appeal Board

" . . . .

"7. The [Human Rights Appeals] board may affirm, remand or reverse any order of the division or remand the matter to the division for further proceedings in whole, or with respect to any part thereof, or with respect to any party, provided however that the board shall limit its review to whether the order of the division is:

" . . . .

"e. not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

[N.Y. EXEC. LAW] § 298. Judicial Review and Enforcement

"Any complainant, respondent or other person aggrieved by any order of the board may obtain judicial review thereof . . . in a proceeding as provided in this section. Such proceeding shall be brought in the appellate division of the supreme court. . . ."

[N.Y. CIV. PRAC. LAW] § 7803. Questions Raised

"The only questions that may be raised in a proceeding under this article are:

" . . . .

"3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

"4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence."

79—7748

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RUBIN KREMER,

Plaintiff-Appellant,

v.

CHEMICAL CONSTRUCTION CORPORATION,

Defendant-Appellee.

On Appeal From The United States District Court
For The Southern District of New York

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AMICUS CURIAE, IN SUPPORT OF PETITION FOR REHEARING EN BANC

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 79-7748

RUBIN KREMER,

Plaintiff-Appellant,

v.

CHEMICAL CONSTRUCTION CORPORATION,

Defendant-Appellee.

On Appeal From The United States District Court
For The Southern District of New York

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AMICUS CURIAE, IN SUPPORT OF PETITION FOR REHEARING EN BANC

STATEMENT OF INTEREST

The Equal Employment Opportunity Commission is the agency established by Congress and the President to administer, interpret, and enforce federal employment discrimination statutes including Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. (1976). See Reorganization Plan No. 1 of 1978, 43 F.R. 19807 (May 9, 1978). Private Title VII actions provide the Commission with essential assistance in securing the elimination of employment discrimination. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974).

The panel's decision in this case requires Title VII complainants, whose state administrative claims have been dismissed by a state agency, to choose between asking a state court to reinstate their claims and pursuing their Title VII claims in federal court. Because, in accordance with the unanimous views of all other courts to have addressed the matter, we believe that Congress clearly intended victims of employment discrimination to be free to pursue state remedies without jeopardizing their right to de novo hearings in federal court, we offer our views to the Court and urge the Court to rehear the appeal en banc.

STATEMENT OF THE CASE

Rubin Kremer was discharged from his job as an engineer for Chemical Construction Company (Chemico) on August 1, 1975. Some employees who were laid off with Kremer were later rehired, but Kremer was not. After his layoff, Kremer applied for a number of engineering positions advertised by Chemico but was not hired.

On May 6, 1976, Mr. Kremer filed a charge with the Equal Employment Opportunity Commission claiming that he was discharged and not rehired because of his religion and national origin (A47). The Commission, in accordance with the requirement of §706(c) of Title VII, 42 U.S.C. 2000e-5(c), deferred Mr. Kremer's charge to the New York State Division of Human Rights (NYHRD), the state administrative agency charged with enforcement of the New York Human Rights Law, N.Y. Exec. L. 285 et seq. (McKinney 1972 and Supp. 1976). The NYHRD conducted an ex parte investigation which included interviews with Mr. Kremer, who was unrepresented by counsel, and a review of documents submitted by Chemico. After its investigation the NYHRD issued a determination finding no probable cause to believe that Chemico's decision not to rehire Mr. Kremer was discriminatory. (A.100). The NYHRD made no finding as to the original discharge. Mr. Kremer, still unrepresented by counsel, appealed to the Human Rights Appeal Board under N.Y. Executive Law §297-a. The Appeal Board affirmed the NYHRD's determination. (A.103).

Proceeding pro se, Mr. Kremer filed a petition with the Appellate Division of the Supreme Court of New York to set aside the NYHRD determination. See §298 of the N.Y. Human Rights Law and CPLR Article 78. (A.43). His petition was denied by the Appellate Division. (A.69). Mr. Kremer did not seek review by the New York Court of Appeals.

Thereafter, the EEOC, giving full weight to the determination of the NYHRD (see §706(b) of Title VII) found that there was not reasonable cause to believe that Mr. Kremer's Title VII charge was true and issued him a notice of right to sue (A.6, 120-21). Mr. Kremer then timely brought this suit (A.3). After a panel of this Court, in another pro se case, Sinicropi v. Nassau County, 601 F.2d 60, cert. denied, ____U.S.____, 100 S.Ct. 488 (1979), had held that judicial review of NYHRD determinations had res judicata effect on subsequent Title VII actions, Judge Sofaer granted Chemico's motion to dismiss, but wrote a long critique explaining why he felt that Sinicropi had been wrongly decided. 477 F.Supp. 587 (S.D.N.Y. 1979).

A panel of this Court affirmed. The panel held that Sinicropi controlled and that only the full Court sitting en banc could properly consider the argument that the decision of another panel was erroneous. Slip Op. at 3231. The panel rejected the argument that, because Mr. Kremer filed his petition for judicial review over a year before Sinicropi had been decided, Sinicropi should not be applied to this case.

The panel held that the Sinicropi decision was foreshadowed in Mitchell v. National Broadcasting Co., 553 F.2d 265 (2d Cir. 1977), a case brought under 42 U.S.C. 1981. The panel concluded that the exception to the general rule that judicial decisions have retroactive effect, announced in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), therefore, did not apply. Slip Op. at 3237.

REASONS FOR GRANTING THE PETITION

We share the views expressed by Judge Feinberg, dissenting in Mitchell v. National Broadcasting Co., supra, 553 F.2d at 277, by Judge Sofaer in his careful analysis in this case, by the Eighth Circuit in Gunther v. Iowa State Mens Reformatory, 612 F.2d 1079 (8th Cir. 1980), cert. denied, 48 U.S.L.W. 3763 (May 27, 1980), and by the petition for rehearing. We join in asking that the Court en banc reconsider the Sinicropi holding which bound the panel in this appeal.

In our view Sinicropi applied res judicata principles inflexibly and gave no attention to countervailing policies embodied in the substantive federal law at issue. For reasons we discuss below, the use of res judicata to prevent access to the federal courts to enforce federal law is scarcely compelled by the doctrine itself. Where its use defeats a strong federal substantive policy by giving deference to the type of state administrative and judicial proceedings which Congress expressly rejected for enforcement of federal

laws, a better balance between res judicata and federal substantive law must be struck.

Sinicropi thwarts the clear Congressional purpose of affording Title VII complainants a right to a de novo hearing in court; i.e., to have the fact finding process performed not by state or federal bureaucrats but by judges. The major effect of the rule, aside from creating a trap whereby Title VII complainants, especially those unrepresented by counsel, will lose their right to a hearing in federal court, will be to undermine the effectiveness of state remedies by creating a strong incentive to forego attempts to correct state errors within the state system in order to preserve federal rights.

a. Res judicata as the panel noted in Mitchell, supra, 553 F.2d at 274, is a flexible doctrine. It "ensures the finality of litigation"; "bars vexatious litigation"; and "frees the courts to resolve other disputes." Brown v. Felsen, 442 U.S. 127, 131 (1979). It reflects the desirability of preserving judicial resources and of creating certainty in legal relations. But it does not require that these goals be achieved at all costs.

The Supreme Court has noted that exceptions to res judicata are appropriate when, in given circumstances, the policy favoring res judicata is weak and the policies of substantive federal law would be undermined by rigid adherence

to the doctrine. Brown v. Felsen, supra, 442 U.S. at 132.[1] Cf. Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 367 (1977)(state policies of repose embodied in state statutes of limitations are incompatible with the substantive policies of Title VII).

Similarly, it is established that the res judicata component of 28 U.S.C. 1738 requiring federal courts to give full faith and credit to state courts is subject to exception in cases where "[o]ther well-defined federal policies, statutory or constitutional" would be adversely affected by deferral to state court determinations. American Mannex Corp. v. Rozands, 462 F.2d 688, 690 (5th Cir.), cert. denied, 409 U.S. 1040 (1972). See also Batiste v. Furnco Construction Corp., 503 F.2d 447, 450 (7th Cir. 1974), cert. denied, 420 U.S. 928 (1975).[2]

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1 / Commentators have similarly urged exceptions to the general rule governing res judicata. For example, the Tentative Draft No. 5 of the Restatement of the Law, Second, Judgments, §61.1 (1978), provides that the general rule should not apply when a state court has no power to enforce a federal law. Under those circumstances a plaintiff "who has litigated a state claim in state court is not barred from an action in the federal court in which he may press his claim against the same defendant under the federal statute." Id. §61.1(c) comment (1) at 189. The draft Restatement provides another relevant exception in §61.2(d) where the "judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme, or it is the sense of the scheme that the plaintiff should be permitted to split his claim." See also §61.2(c). Id.

2 / While it is true that under 28 U.S.C. 1738 federal courts ordinarily defer to judgments of state courts, it is, as the Court recognized in Alexander v. Gardner Denver, (Footnote continued)

b. As Judges Feinberg and Sofaer and the petition note, Congress intended (1) to provide de novo judicial proceedings in Title VII cases rather than to limit the parties to judicial review of administrative determinations and (2) to use state laws to supplement but not supplant the federal remedy. Sinicropi is incompatible with both of these Congressional policies.

1. In Alexander v. Gardner-Denver Co., supra, 415 U.S. at 56, the Supreme Court, in a unanimous decision, declared that a Title VII claimant has a "statutory right to attempt to establish his claim in a federal court." The Court stated: "The purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII." Id. The Court concluded that it would be inconsistent with the purposes of Title VII to preclude a Title VII suit because of a prior arbitral decision involving the same claim. See also Chandler v. Roudebush, 425 U.S. 840, 844 (1976) ("It is well established that §706 of the Civil Rights Act of 1964 accords private-sector employees the right to de novo consideration of their Title VII claims [in federal court]").

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2 / (Footnote continued)
supra, 415 U.S. at 54, equally true that arbitration awards such as the one held not to have res judicata effect in that case, are ordinarily recognized as binding in subsequent federal court actions. Similarly, the determinations of state administrative agencies are often afforded res judicata effect, at least in state courts. See Batiste v. Furnco Construction Corp., supra, 503 F.2d at 450. Whether unreviewed decisions of the NYHRD are entitled to res judicata effect in New York courts is not clear. See Mitchell v. National Broadcasting Co., supra, 553 F.2d at 273.

As the Court noted in Chandler, Congress in 1972 expressly chose not to make Title VII rights subject to administrative oversight. It defeated attempts to create a federal administrative agency with powers to hear and determine cases, subject to judicial review. 425 U.S at 848-52. Instead, it retained the EEOC's power to investigate and make determinations of reasonable cause. Whatever findings the EEOC made, however, were to be irrelevant in any subsequent suit.

It strains credulity to believe that when Congress determined that federal bureaucrats could not bind the disputants after a federal ex parte investigation it intended to permit state bureaucrats to do so after a state ex parte investigation. See Voutsis v. Union Carbide Corp., 452 F.2d 889 (2d Cir. 1971), cert. denied, 406 U.S. 918 (1972), cited with approval in Alexander v. Gardner-Denver Co., supra, 415 U.S. at 49 n.11. The fact tnat the dismissal by the NYHRD was confirmed as not an abuse of discretion by a state court--a matter we discuss below--does not alter the considerations which dictate that thd plaintiff should have a trial de novo of Title VII claims in federal court. The strong policy of Title VII which dictates against deferral by federal courts to determinations of state or federal administrative agencies applies with equal force to determinations which have been affirmed without de novo review, by state courts.

2. Aside from insisting on de novo reviews of adminstrative determinations, Congress intended state proceedings to supplement rather than supplant Title VII rights. As this Court held in Voutsis v. Union Carbide Corp., supra, 452 F.2d at 893:

> The Congressional policy here sought to be enforced is one of eliminating employment discrimination, and the statutory enforcement scheme contemplates a resort to the federal remedy if the state machinery has proved inadequate. The federal remedy is independent and cumulative.

See also New York Gaslight Club, Inc. v. Carey, ____U.S.____, 48 U.S.L.W. 4645, 4648 (June 9, 1980) ("It is clear. . .that Congress viewed proceedings before the EEOC and in federal court as supplements to available state remedies for employment discrimination"); and Alexander v. Gardner-Denver Co., supra, 415 U.S. at 47-48. Cf. Johnson v. Railway Express Agency Inc., 421 U.S. 454, 461 (1975); and General Telephone Co. of the Northwest Inc. v. EEOC, ___U.S.____, 100 S.Ct. 1698, 1707 (1980).

This complementary enforcement scheme was devised, as the Court recognized in Voutsis, because, although Congress wanted to preserve state and local enforcement schemes, it realized that state and local laws varied widely in effectiveness because of inadequate legislation, inadequate procedures and inadequate budgets. Voutsis, supra, 452 F.2d at 894. Therefore "Title VII. . .provides a supplemental right to sue in federal court if satisfactory relief is not obtained in state forums"

New York Gaslight Club, Inc. v. Carey, 48 U.S.L.W. at 4649.

The panel's conclusion in Mitchell that preclusion of a federal court Title VII claim is appropriate in this context because a complainant can satisfy Title VII's deferral requirement without resorting to state court remedies misses the point. The fact that a complainant may be able to satisfy the minimum requirements of Title VII's deferral provision without going into state court does not mean that Congress' intent that Title VII "supplement, rather than supplant, existing laws and institutions relating to employment discrimination," Alexander v. Gardner-Denver Co., supra, 415 U.S. at 48-49, is served by a rule which allows a complainant to obtain review of the dismissal of his state claim only at the expense of his right to a federal court hearing of his Title VII claim.

3. The New York procedures are precisely those which Congress rejected for enforcement of Title VII and which are inadequate to replace the federal scheme. The proceedings begin with a perfunctory ex parte administrative investigation which results in either a finding of probable cause or in dismissal if the investigator is unable to obtain enough information to persuade him and his supervisors that enough evidence exists to warrant further proceeding. N.Y. Executive Law §297(2)(McKinney. Supp. 1978). Mr. Kremer's, Ms. Sinicropi's and Ms. Mitchell's claims never survived this stage. Only if probable cause is found and conciliation efforts fail

is an adversarial hearing held. N.Y. Exec. Law 297(4)(a). (McKinney. Supp. 1978). After the hearing, the NYHRD must make findings and, if it finds the complaint valid, may order relief. N.Y. Exec. Law §297(4)(c)(McKinney. Supp. 1978).

The approach taken in Sinicropi and this case, involves artificial distinctions for res judicata purposes between different stages of the remedial scheme set up by New York State to handle claims of employment discrimination. The limited state court review which Mr. Kremer obtained is an integral part of his state administrative remedy. See New York Gaslight Club, Inc. v. Carey, supra, 48U.S.L.W. at 4649. ("The New York state procedure to which respondent's charge was referred provides for adversarial quasi-judicial hearings leading to findings of fact, administrative appeals and judicial review" (emphasis added).) To treat it differently for res judicata purposes will produce anomalous results in many cases and ultimately will do a disservice to the state's remedial efforts.

The Human Rights Law provides a limited two-tiered appellate procedure. Appellate review of orders of the NYHRD dismissing complaints at the end of the NYHRD investigation is particularly limited. The Human Rights Appeal Board, N.Y. Exec. Law §297-a(7)(McKinney) and the Appellate Division of the Supreme Court, N.Y. Exec. Law §298 (McKinney. Supp. 1978) or C.P.L.R. Article 78, are restricted to determining only whether the NYHRD's findings are arbitrary and capricious or an abuse of discretion. The findings of the agency are

binding if they are supported by the administrative record.

It is clear that the type of limited review, based on the administrative record, which can be obtained under the New York law cannot, precisely because of its limited nature, transform an administrative fact finding proceeding into the equivalent of a judicial trial.

When a complainant is dismissed at the first stage of the administrative process, like Mr. Kremer was, it is especially inappropriate to attach res judicata effect to his appeal to state court. In that situation the complainant is merely seeking to obtain a full administrative hearing which he feels he has been unfairly denied. He is not seeking nor can be obtain de novo review in the state court and the court can only decide whether the NYHRD determination accords with the result of its investigation no matter how inadequate that investigation may be. Nor can the state court give any relief other than a remand to the NYHRD for further proceedings. Thus the appeal is merely part of the administrative process rather than the de novo review Congress intended.

The Mitchell panel's reliance on perceived similarities between the procedure followed by the NYHRD when it dismisses a complaint for lack of probable cause and the summary judgment procedures in federal courts misses the point. However

similar the standards may be,[3/] there will always be a critical difference, since, in the state proceedings, the decision to dismiss is made by employees of a state agency and not by federal judges whom Congress intended to have the ultimate authority in Title VII cases.

The fact that the final determination under the state procedure was rendered by a court therefore does not mandate a different result in this case than would be reached in a case involving arbitration or administrative determinations.

4. Sinicropi does a disservice to the state anti-discrimination procedures by encouraging complainants to foresake their rights to seek state review of adverse decisions of the NYHRD. The state legislature specifically included limited judicial review as part of the procedure it devised to remedy employment discrimination. Such appellate review plays an important role in any adjudicative scheme by providing a

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3/ There is considerable doubt that New York courts consistently apply the standard articulated in Mayo v. Hopeman Lumber & Manufacturing Co., 33 A.D. 2d 310, 307 N.Y.S. 2d 691 (1979), as the Mitchell panel assumed. Other New York courts have indicated that dismissals for want of probable cause will not be reversed solely because material facts are in dispute. See discussion in Kremer v. Chemical Construction Corp., 477 F.Supp. at 592 n.7. In this case a dismissal for no probable cause was confirmed by the Appellate Division dispite the fact that numerous, material factual disputes are apparent in the record.

mecnanism for establishing uniform standards and for controlling agency excesses.

After Sinicropi, it seems unlikely that any reasonable, informed complainant will forego his right to a trial de novo in federal court in favor of a limited review of an adverse agency determination before a state court which could, at best, remand his claim to the agency for futher proceedings. Thus, the Sinicropi rule will serve only as a trap for unwary complainants and a strong deterrent to informed complainants' seeking review of state agency determinations.[4/]

Respectfully submitted,

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4/ Mr. Kremer also argues that the Sinicropi rule should not be applied to his case, because he applied for review to the state court more than a year before Sinicropi was decided. We agree with Mr. Kremer's position. The panel's holding that the result in Sinicropi was foreshadowed by the earlier decision in Mitchell v. National Broadcasting Co., supra, is unconvincing because, as appellant points out, a number of courts, including the district court in this case had held that Mitchell did not apply to Title VII cases.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing brief were today mailed , first-class postage prepaid, to the following counsel of record:

David A. Barrett
Cravath, Swaine & Moore
One Chase Manhattan Plaza
New York, N.Y. 10005

Robert Layton
Layton and Sherman
50 Rockefeller Plaza
New York, N.Y. 10020

July 11, 1980

VINCENT BLACKWOOD
Attorney

No. 80-6045

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1980

Office-Supreme Court, U.S.
FILED
MAY 4 1981
ALEXANDER L. STEVAS,
CLERK

RUBIN KREMER,

Petitioner,

-against-

CHEMICAL CONSTRUCTION CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner submits this supplemental brief to bring to the Court's attention the recent per curiam opinion of the United States Court of Appeals for the Second Circuit in Ottaviani v. State University of New York, No. 80-7601 (2d Cir., April 29, 1981). A copy of the opinion is appended hereto.

The Ottaviani case involves essentially the same issue presented by the Petition in this action. In affirming the district court's dismissal of the plaintiff's Title VII action, the panel in Ottaviani "fe[lt] compelled to follow" the Second Circuit's opinion in Petitioner's case and in Sinicropi v. Nassau County, 601 F.2d 60 (2d Cir.) (per curiam), cert. denied, 444 U.S. 983 (1979), the

authority relied on by the Second Circuit in affirming dismissal of Petitioner's action (see Pet. at 5-7).

As noted in the Petition, the Second Circuit's decisions in this case and in Sinicropi conflict with post-Sinicropi decisions in at least two other circuits and the Second Circuit's reasoning in those decisions has been rejected by four other circuits and at least eight district courts. (Pet. at 8-9). The Ottaviani court acknowledged this conflict, observing that

> "We realize that there is a split in authority in the circuits, . . . but we feel compelled to follow our own precedents." (Slip op. at 2749)

Ottaviani thus underscores the need for this Court to grant the Petition to resolve a conflict among the circuits on a critical question under Title VII, and further illustrates the frequency with which this important issue arises.

May 1, 1981

Respectfully submitted,

FREDERICK A. O. SCHWARZ, JR.,

One Chase Manhattan Plaza,
New York, N. Y. 10005
(212) 422-3000

Attorney for Petitioner

SUPPLEMENTAL APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 985—September Term, 1980

(Argued April 9, 1981 Decided April 16, 1981*)
(Opinion filed April 29, 1981)

Docket No. 80-7601

ROBERTA OTTAVIANI, Individually and on behalf of all other persons similarly situated,

Plaintiff,

—and—

ELINOR BOICE,

Intervenor-Plaintiff-Appellant,

—against—

STATE UNIVERSITY OF NEW YORK AT NEW PALTZ and CLINTON R. WHARTON, JR., in his capacity as Chancellor of the State University of New York,

Defendants-Appellees.

* This appeal was originally heard on April 9, 1981 and was decided by order, dated April 16, 1981. Such a summary disposition has no precedential value under our Local Rule § 0.23. However, counsel in the *Kremer* case referred to in the text of this opinion has informed us that he wishes to quote from the April 16 order in connection with a petition for certiorari in that case. Accordingly, we repeat the substance of our April 16 order in this per curiam opinion, which will be published.

Before:

FEINBERG, *Chief Judge,*
LUMBARD and VAN GRAAFEILAND, *Circuit Judges.*

Appeal from judgment of the United States District Court for the Southern District of New York, Mary Johnson Lowe, J., denying appellant intervention as party plaintiff.
Judgment affirmed.

CAROLINE V. RIDER, Weiner & Rider, Red Hook, NY, *for Plaintiff-Appellant.*

PATRICIA C. ARMSTRONG, New York, NY, Assistant Attorney General of the State of New York (Robert Abrams, Attorney General of the State of New York, George D. Zuckerman, Assistant Solicitor General of the State of New York, of Counsel), *for Defendants-Appellees.*

PER CURIAM:

Plaintiff-intervenor Elinor Boice appeals from an order of the United States District Court for the Southern District of New York, Mary Johnson Lowe, J., granting the motion of defendant-appellee State University of New York at New Paltz (SUNY) to reconsider and vacate an earlier motion allowing appellant Boice to intervene as a party plaintiff in the class action suit of Ottaviani v. SUNY. In granting

defendant's motion, Judge Lowe stated that the district court was bound by the opinion of this court in Sinicropi v. Nassau County, 601 F.2d 60 (2d Cir.) (per curiam), cert. denied, 444 U.S. 983 (1979). We agree that that decision and our more recent opinion in Kremer v. Chemical Construction Corp., 623 F.2d 786 (2d Cir. 1980), require the result reached by the district court. We realize that there is a split in authority in the circuits, ably brought to our attention by appellant's counsel, but we feel compelled to follow our own precedents.

The judgment of the district court is affirmed.

Office-Supreme Court, U.S.
FILED
AUG 10 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-6045

In the Supreme Court of the United States

OCTOBER TERM, 1981

RUBIN KREMER,
Petitioner,

v.

CHEMICAL CONSTRUCTION CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 13, 1981.
CERTIORARI GRANTED JUNE 22, 1981.

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(78 Civ. 3182)

KREMER

v.

CHEMICAL CONSTRUCTION CORP.

RELEVANT DISTRICT COURT DOCKET ENTRIES

7/14/78 Complaint and issued Summons

9/5/78 Defendants' Memorandum of Law, Affidavit and Notice of Motion for an order pursuant to Rule 12(b) of the FRCP, dismissing action on grounds of Res Judicata filed

9/14/78 Plaintiff's Reply in opposition to defendant's motion to dismiss action on grounds of Res Judicata filed

12/19/78 Opinion: defendant's motion to dismiss action denied (Pierce, J.) filed

3/1/79 Answer filed

3/12/79 Pro se plaintiff's Reply in opposition to Answer filed

4/26/79 NOTICE OF REASSIGNMENT, from Pierce, J. to Sofaer, J.

9/20/79 Opinion: The motion to dismiss is granted and the complaint is dismissed without costs to either side (Sofaer, J.) filed

9/24/79 Judgment filed

10/17/79 Plaintiff's Notice of appeal to the USCA 2nd Circuit from the decision dismissing the complaint filed

(79-7748)

KREMER

v.

CHEMICAL CONSTRUCTION CORP.

RELEVANT COURT OF APPEALS DOCKET ENTRIES

10/26/79 Copy of notice of appeal on behalf of Rubin Kremer filed and copy of order granting forma pauperis filed

1/7/80 Appellant Kremer's brief filed

2/11/80 Appellee Chemical Construction Corp.'s brief filed

2/21/80 Appellant Kremer's reply brief filed

3/12/80 Case argued before Hon. Lumbard, Friendly, Meskill, CJJ.

6/2/80 Judgment affirmed by published opinion and judgment filed

6/5/80 Appellant Kremer's Petition for rehearing and petitions for rehearing en banc filed

7/25/80 EEOC amicus brief in support of petition for rehearing en banc filed

1/20/81 Notice of filing petition for certiorari with Supreme Court filed

6/27/81 Certified copy of order from Supreme Court granting forma pauperis and writ of certiorari filed

April 20, 1976

Rubin Kremer
2741 Matthews Ave.
Bronx, New York, N.Y. 10467

United States Equal Employment Opportunity
26 Federal Plaza, Room 4000
New York, N.Y.

Gentlemen:

The enclosed story took place at Chemical Construction Corporation, One Penn Plaza, New York 10001, on August 1, 1975.

This kind of relations between people, namely, conspiracy and discrimination are incopatible with the principles of human rights and should not pass over in silence in the file of the Personnel Department of Chemical Construction Corporation.

I am ready and willing to give you farther explanations which will be helpful to elucidate the real reasons of my lay off, and the conditions I worked with Chemical Construction Corporation.

In my opinion this lay off should be canceled. Chemical Construction Corporation who accepted the action of Mr. E. Paul and Mr. J. Puc should not only pay full compensation for the time I was unable to find a job but also a penalty for the bitter experience I have been sorely afflicted. I would like to ask you to look into this question in accordance to the compulsory law in the United States of America. Thank you.

Sincerely,

R. KREMER

CHARGE OF DISCRIMINATION	EEOC Charge No.	Form Approved OMB No.

Instructions

If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's District Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE. (Attach extra sheets of paper if necessary.)

Cause of Discrimination

- ☐ Race or Color ☐ Sex
- ☒ Religious Creed
- ☒ National Origin

Name (Indicate Mr. or Ms.)	Date of Birth
Mr. Rubin KREMER	November 21, 1917
Street Address County	**Social Security No.**
2741 Matthews Ave.	180-46-5915
City, State, and Zip Code	**Tel. No. (include area code)**
Bronx, New York, N.Y. 10467	212-231-8229

THE FOLLOWING PERSON ALWAYS KNOWS WHERE TO CONTACT ME

Name (indicate Mr. or Ms.)	Tel. No. (include area code)
Mr. Abraham STERN	212-882-9896/212-OL.1-2917
Street Address	**City, State, and Zip Code**
2520 Radcliff Ave.	Bronx, New York, N.Y. 10469

LIST THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT WHO DISCRIMINATED AGAINST YOU (if more than one, list all)

Name	Tel. No. (include area code)
Chemical Construction Corporation	212-239-5100
Street Address	**City, State, and Zip Code**
One Penn Plaza	New York, N.Y. 10001

Others Who Discriminated Against You (if any)		
Charge filed with state/local gov't ☐ yes ☐ no	**Date filed**	**Agency charge filed with (Name & address)**

Approximate No. of employees/members of company or union this charge is filed against	Date most recent or continuing discrimination took place (Month, day, and year)
About 800	August - December 1975

Explain what unfair thing was done to you and how other persons were treated differently. Understanding that this statement is for the use of the United States Equal Employment Opportunity Commission, I hereby certify:

In November 1973 Mr. Janoz Puc was appointed as the Suprvisor of the Piping Analytical Department. Since that time I was permanently discriminated not to be full employed and to charge the time spent in

the Company to "C", as idle time. In the same time other employees were working overtime. This policy should help him to remove me from the Company, which finally took place on August 1, 1975.
In all this proceedings Mr. Karl Hou was his chief advisor. When I left the Company he told me "the time is come".

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief		NOTARY PUBLIC	Subscribed and sworn to before me this date (Day, month, and year)
Date May 6, 1976	Charging Party (Signature) s/ R. Kremer		Signature (If it is difficult for you to get a Notary Public to sign this, sign your own name and mail to the District Office. The Commission will notarize the charge for you at a later date.)
Subscribed and sworn to before this EEOC representative.			
Date 5-6-76	Signature and Title s/ Illegible		

EEOC Form 5 Jun 72 Previous editions of this form may be used.

EEOC AFFIDAVIT ☐ Respondent ☒ Charging Party ☐ Witness

After being duly sworn and upon my oath, I depose and say:

Name	Age	Tel. No. (Give area code)
Rubin KREMER	58	212-231-8229

Address (Number and Street)	City
2741 Matthews Ave.	Bronx, New York, 10467

County/Parish	State/Commonwealth
	New York

THE FOLLOWING PERSON CAN ALWAYS CONTACT ME

Name	Relationship	Tel. No. (Give area code)
Mr. Abraham Stern	Friend	212-882-9896 212-OL3-2917

Address (Number and street)	City And State/Commonwealth
2520 Radcliff Ave.	Bronx, New York 10469

STATUS OF EMPLOYMENT

Check One ☒ Not Working ☐ Working ☐ Sought Employment At

Name of Employer

Type Of Business	Date of Employment/ When Employment Was Sought	
	From	To

Position Title	Department

Location (Number and street)	City

County/Parish	State/Commonwealth	Work Tel. No.

Additionally, While working on a proposal of an ammonia plant I pointed out that the information which we received are incorrent. The job was taken away from me and never came back. For several days I was sitting idle, despite that I asked to give me some work to perform.

- When I checked the ammonia job/2008/Mr. Puc did not allow to charge the time on the job number, but insist to charge "G".
- When I worked on a proposal of an urea plant based on the Snam Progetti process, after the fundamentals were solved, the drawings were sent to drafting. The job never came back to me. Other employees were working on. All arround laughing aloud told me "They took from you the ammonia job and now the urea job. The drawings which I had gradually disappeared I was sitting idle.
- Mr. Puc used to order me to perform some work which usually should not

be given to experienced individuals. Besides the normal weekly time sheet he insist to write a special statement on what I have spent the time, in order to show what kind of work I have performed.

- At the end of March 1975, Mr. E. Poul informed me that I am laid off. I disclosed the conditions I worked to the Personnel Manager, Mr. W. Mager. This lay off was cancelled. The working conditions improved slightl
- On July 31, 1975 Mr. E. Poul told me that starting from August 1, 1975 I am laid off, because of lack of work. I worked at that time with Coalcon According to my knowledge Coacon sent to the Personnel Dpt. of Chemical Construction Corp. a list of employees from Coalcon want to continue their work. I was on the list. Only I was turned down. Unfortunately, nobody want to talk to me. And so I was thrown out.
- On August 8, 1975 Mr. Parish Shah was hired in Piping Analytical Dept.
- On August 10, 1975 Mr. Navin Shah was rehired. Laid off on August 1, 1975.
- About August 23, 1975 Mr. Tapan Banerjee was hired in Piping Anal. Dept. There was no lack of work for me in CPPC.
- On November 2, 1975 based on an ad of CPPC in The New York Times and on Dr. Th. Gibians statement of September 24, 1975/see enclosure/I sent an application to Mr. Don Steenland and Mr. J. Kevin Coleman of the Personnel Dept. of CPPC. My Education, Background and Experience suited exact with all the requirements listed in the ad.

On December 4, 1975 I received a letter from Mr.D. Steenland and Mr. J.K. Colemen that my experience is not suited to their requirements/see encl./.

I swear or affirm that I have read the above statement and that it is true to the best of my knowledge, information and belief.

Signature	Social Security No.	Total No. Of Pages
s/ Rubin Kremer	180-46-5915	2

SUBSCRIBED AND SWORN TO BEFORE THIS EEOC REPRESENTATIVE

Date	Title	Signature
5-6-76	(Illegible)	(Illegible)

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS

Complaint No.

EEOC Charge No.

STATE DIVISION OF HUMAN RIGHTS
ON THE COMPLAINT OF
RUBIN KREMER, COMPLAINANT

—against—

CHEMICAL CONSTRUCTION CORPORATION, RESPONDENT(S)

I, Rubin Kremer residing at 2741 Matthews Avenue, Bronx, N.Y. Tel. No. 231-8229 charge the above-named respondent(s) whose address(es) is (are) 1 Penn Plaza, New York, N.Y. 10011, with an unlawful discriminatory practice relating to employment in violation of Article 15 of the Executive Law of the State of New York (fill in field of jurisdiction) on or about August 1975 because of AGE (X) RACE ( ), CREED (X), COLOR ( ), NATIONAL ORIGIN ( ), SEX ( ), DISABILITY ( ), MARITAL STATUS ( ), RETALIATION ( )

The particulars are:

1: I was employed by Chemical Construction Corporation in June 25, 1973 as a piping analytical engineer. I was terminated on August 1, 1975.

2: I was told that I was layed off due to lack of work. In August of 1975 I learned that several people were hired and rehired in the piping analytical department.

3: The people hired and rehired are much younger than I, and previous to my being layed off I was the only Jewish person in the department.

4: I am 58 years of age and of the Jewish faith, and I charge Chemical Construction Corporation with an unlawful discriminatory practice relating to employment, by denying me equal terms, conditions and privileges of employment because of my age and creed, in violation of the Human Rights Law of the State of New York.

I have not commenced any other civil, criminal or administrative action or proceeding in any court or administrative agency based upon the same grievance.

[X] I also charge the above-named respondent(s) with violating Title VII Civil Rights Act 1964, as amended (covers race, color, religion, sex, national origin relating to employment) and hereby authorize SDHR to accept this verified complaint on behalf of EEOC subject to the statutory limitations contained in Title VII.

/s/ Rubin Kremer
RUBIN KREMER

STATE OF NEW YORK)
COUNTY OF BRONX) ss.:

Rubin Kremer, being duly sworn, deposes and says: that he is the Complainant herein; that he has read (or had read to h——) the foregoing complaint and knows the contents thereof; that the same is true of h—— own knowledge except as to the matters therein stated on information and belief; and that as to those matters, he believes the same to be true.

/s/ Rubin Kremer
RUBIN KREMER

Subscribed and sworn to before me
this 20th day of May —, 1976

STATE OF NEW YORK
DIVISION OF HUMAN RIGHTS
COMPLAINANT'S INFORMATION SHEET
———————— REGIONAL OFFICE

COMPLAINANT:

RESPONDENT:

I, Rubin Kremer, the complainant in the above matter acknowledge the following:

1. I have been advised that according to the Division's Rules of Practice:

   a. The Division or I shall be able to reasonably amend my complaint;

   2. This complaint may be withdrawn by me at any time before the service of a Notice of Public Hearing

   c. Upon my application, or on his own motion, the Commissioner may reopen the proceedings after this matter has been closed

   d. If this matter is conciliated, I will be given fifteen days in which to agree to or object to the terms of conciliation

   e. I may be present and shall be allowed to present testimony in person or by counsel and cross-examine witnesses in a Public Hearing on this matter.

2. I have been informed that a copy of my complaint and/or the determination in this matter will be sent to ————————, The local human rights commission, or referral agency of my choice.

3. I have been informed of my right to retain private counsel.

4. a. I understand that I, or my attorney, may review the Division's file in this matter.

   b. I also understand that I, or my attorney, may copy by hand any material in the file.

5. I am to notify the Regional Office of the Division of any change in my address, telephone number, or place of employment which may occur during the course of the Division's handling of this matter.

6. Except for emergency situations, I shall give the Division's Regional Office four days' notice in the event that I cannot attend any scheduled conference at which my presence has been requested.

7. I acknowledge receipt of a copy of the complaint in the above entitled matter.

Date: May 20, 1976

/s/ Rubin Kremer
RUBIN KREMER
Complainant's Signature

NEW YORK STATE EXECUTIVE DEPARTMENT
DIVISION OF HUMAN RIGHTS

Case Nos. Ia-E-AC-3576-76E
E-AC-42821-76E

RUBIN KREMER, COMPLAINANT

vs.

CHEMICAL CONSTRUCTION CORPORATION, RESPONDENT

DETERMINATION AFTER INVESTIGATION

On May 20, 1976, Rubin Kremer, Rubin Kremer filed a verified complaint with the State Division of Human Rights charging the above-named respondent(s) with an unlawful discriminatory practice relating to employment, because of age and creed in violation of the Human Rights Law of the State of New York.

After investigation and following a review of related information and evidence with named parties, the Division of Human Rights has determined in the above-entitled complaint that there is no probable cause to believe that the respondent(s) engaged in or was (were) engaging in the unlawful discriminatory practice complained of.

This determination is based on the following:

The record shows that this complainant was not rehired by the respondent employer because one employee with greater seniority was chosen.

The other person that was rehired, filled a lesser position than that held by complainant.

Complainant's creed, or age, was not a factor in these selections.

This complaint is therefore ordered dismissed, and the file closed.

THE COMPLAINANT OR ANY PARTY TO THE PROCEEDING BEFORE THE DIVISION MAY APPEAL THIS ORDER TO THE STATE HUMAN RIGHTS APPEAL BOARD, TWO WORLD TRADE CENTER 82ND FLOOR, NEW YORK, NEW YORK 10047, BY FILING A NOTICE OF APPEAL WITHIN FIFTEEN (15) DAYS AFTER THE DATE OF THE SERVICE OF THIS ORDER.

Dated: Apr. 28, 1977

STATE DIVISION OF HUMAN RIGHTS

By /s/ George C. Findlay
GEORGE C. FINDLAY
Regional Director

To: Mr. Rubin Kremer
c/o N. Rosenberg
762 Brady Ave., Apt. 127
Bronx, N.Y. 10462

Chemical Construction Corporation
1 Penn Plaza
New York, N.Y. 10001

Att: Mr. Don Steenland, Personnel Director

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
STATE HUMAN RIGHTS APPEAL BOARD

Case No. E-AC-4281-76E

Appeal No. 4151

RUBIN KREMER, COMPLAINANT-APPELLANT

vs.

CHEMICAL CONSTRUCTION CORPORATION, RESPONDENT

ORDER

The above-entitled appeal having been filed with this Board on May 10, 1977 and having come on to be heard before Honorable Richard Wong on the 16th day of September, 1977 and Rubin Kremer, complainant-appellant having appeared in person, argued and submitted a brief on his own behalf, and respondent having appeared by Layton & Sherman, Esqs., Donald M. Crook, Esq., of Counsel, who argued on behalf of respondent, and the State Division of Human Rights having appeared by Gladys M. Foster, Esq., Senior Attorney, who submitted on the record, and

The Board having reviewed the record herein and having considered the arguments of the parties, and the brief on behalf of complainant-appellant, and a majority of the Board having decided that the Determination and Order of the State Division of Human Rights dismissing the complaint of the complainant-appellant was not arbitrary, capricious or an abuse of discretion, (Hon. T. Blum not participating) it is

ORDERED that the Determination and Order of the State Division of Human Rights made herein on April 28, 1977 be, and the same is hereby in all respects affirmed.

STATE HUMAN RIGHTS APPEAL BOARD

By /s/ Irma Vidal Santaella, Chairman
IRMA VIDAL SANTAELLA

Dated & Mailed: November 25, 1977

To: (see attached list)

STATE OF NEW YORK
EXECUTIVE DEPARTMENT

STATE HUMAN RIGHTS APPEAL BOARD
Two World Trade Center
New York, N.Y. 10047

TO: All Parties to this Proceeding—Appeal No. 4151

NOTICE OF ORDER

PLEASE TAKE NOTICE that herewith attached is the Order of the State Human Rights Appeal Board.

ANY COMPLAINANT, RESPONDENT OR OTHER PERSON AGGRIEVED BY THIS ORDER MAY OBTAIN JUDICIAL REVIEW THEREOF. *Such proceeding shall be brought in the Appellate Division of the Supreme Court of the State in the appropriate judicial department WITHIN 30 DAYS OF SERVICE OF THIS ORDER.* (See Section 298, Human Rights Law.)

Attachment:

Rubin Kremer
c/o R. Garkawe
2120 Wallace Ave., Apt. 2B
Bronx, New York, N.Y. 10462

Tel.-/212/-892 1322

December 4, 1977

Equal Employment Opportunity Commission
New York District Office
90 Church Street, Room 1301
New York, N.Y. 10007

Mr. Arthur W. Stern
District Director

Charge No.: TNY 6—1526
Re.: Chemical Construction Corporation

Dear Mr. Stern:

On May 20, 1976 based on the instructions in your letter of May 7, 1976 I filed a formal complaint with the Division of Human Rights of the Executive Department of the State of New York, alleging that Chemical Construction Corporation, unlawfully discriminated against me by refusing to reemply as a piping analytical engineer because of age and crede, in violation of Section 296 of the Human Rights Law of the State of New York.

After the filing of the complaint on May 20, 1976 the following proceeding ensued:

1. The Conference arranged by the Human Rights Division at 270 Broadway, N.Y. for Conference and Production of Records, on August 12, 1976 in the New York State H.R.D. did not take place.
2. On August 24, 1976 a review of the Exhibits presented by the respondent and prepared by Mr. Don Steenland, Personnel Director of Chemico, conducted be-

fore Martha Garland, a Field Representative of the Human Rights Division took place. I verbally turned down all the statements entirely and demonstrated with documents that they are untrue and false. The Field Representative failed to include in her "Complainants Rebuttle" the basic information surrounding my termination. Respondent did not attend this review.

3. On November 9, 1976 I was investigated by Ms. Lillian H. Fennel, Regional Director of the Human Rights Division. I informed the Director of the H.R.D., between others, that to my knowledge Chemical Construction Corporation signed the Anti-Jewish and Anti-Israeli Arab Boycott. After this investigation Ms. Fennel stated "You were fired because you are Jewish not because of your age". There is no record in the file that this investigation took place.

4. Mr. George C. Findlay, Regional Director of the Human Rights Division, during a brief appointment at the end of March, 1977 stated, "Your case looks favourable". There is no record in the file that this appointment took place.

5. By determination dated April 28, 1977 the State Division of Human Rights, by George C. Findlay, Regional Director, dismissed my complaint on the ground that, "The record shows that this complainant was not rehired by respondent employer because one employee with greater seniority was chosen. The other person that was rehired, filled a lesser position than that held by complainant".

6. The following people were hired and rehired in the Piping Analytical Department 153 of Chemical Process Plant Co./CPPC/ in August 1975.

   —Mr. Parish Shah, age about 25-27, was hired on August 8, 1975. He did not work previously in

the Piping Analytical Dept. 153 of CPPC, and did not work on the Russian ammonia job/2008/

—Mr. Navin Shah, age about 25-27, rehired on August 10, 1975. Laid off on August 1, 1975.

—Mr. Tapan Banerjee age about 25, was hired about August 23, 1975. He never previously worked in Piping Analytical Dpt. of CPPC. Laid off on October 31, 1975 and transferred to Coalcon.

—Mr. Krishma Raj was rehired sometime in August 1975. Laid off on August 1, 1975.

7. Based on Dr. Th.G. Gibians statement of September 24, 1975 and on Chemicoss advertisements in The New York Times I applied for a job with Chemico:

—on November 2, 1975,	Ad. on Nov. 2, 1975
—on May 21, 1976,	Ad. on May 16, 1976
—on July 16, 1976,	Ad. on July 11, 1976
—on August 15, 1976,	Ad. on August 15, 1976
—on September 8, 1976,	Ad. on September 5, 1976

All the positions advertised corresponded exactly with my background and qualifications. None of the advertisements called for engineers who had previous experience with Chemico or in the U.S., as respondent contendet. However, the advertisements on August 15, 1976 and on September 5, 1976 called for engineers with piping analytical experience, a position I held previously with Chemico.

8. Mr. Don Steenland in his letter of September 17, 1976 to the New York State Division of Human Rights stated between others, "Further we want to make it very clear that we would not re-employ him merely for the sake of appearing his claims against Chemico.

9. Mr. John Puc former supervisor, despite his negative attitude towards me in his opinion of May 27, 1976 could not deny the following, "He was technically competent piping analytical engineer with excellent background in other engineering branches such as process, exceeding the average experience of piping analytical engineer. His performance was qualitatively very good. Unfortunately his competence was offset by his slowness in performance of his duties". There were never complaints from the Project Management of my "slowness". On the contrary, the Management was satisfied when I pointed out incorrectness in order to avoid unnecessary work in our department as well in other departments to whom we released information for further performance.

10. Mr. E. Paul in his performance rating of June 19, 1975 stated, "Hold for knowledge and skills. Improve comunicat." One month later on July 29, 1976 *in order to remove me from the Company my performance rating became "Below Average"*. It should be noted that in June 1975 I worked on the insulation project of the piping system for the Russian ammonia job /2006/, when I changed Mr. E. Pauls approach, with his approval, I saved an amount of money equal approximately to a ration eight to one.

11. By notice dated May 10, 1977, I appealed the Human Rights Division determination to the State Human Rights Appeal Board. After argument before the State Human Rights Appeal Board on September 16, 1977, by order dated November 25, 1977 the order appealed from was affirmed. It should be noted that the Presiding Member Comm. R. Wong found that the file does not contain my brief to the Appeal Board dated May 10, 1977. The Appeal Board did not examine the witnesses listed on page 5 in my brief.

12. The determination by the State Division of Human Rights and the order of the State Human Rights Appeal Board constituted final agency action under the Human Rights Law of the State of New York and the Civil Practice Law and Rules. This determination and order dismissing the complaint were made in violation of law, were arbitrary and capricious, constituted an abuse of discretion, if lawfully applied, did not bar unlawful discriminatory practice. Therefore I ask the United States Equal Opportunity Commission to reconsider this case in accordance to the compulsory law in the United States of America.

Sincerely,

R. KREMER

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION
FIRST DEPARTMENT

RUBIN KREMER, PETITIONER-APPELLANT

v.

THE STATE DIVISION ON HUMAN RIGHTS,
THE STATE HUMAN RIGHTS APPEAL BOARD
and CHEMICAL CONSTRUCTION CORPORATION, RESPONDENTS

NOTICE OF PETITION

SIRS:

PLEASE TAKE NOTICE that upon the annexed petition of Rubin Kremer, verified the 6 day of December, 1977, an application will be made at a term of this court to be held at the courthouse thereof, located at Madison Avenue and 25th Street, Borough of Manhattan, City of New York, on the 28 of December, 1977, at 10:00 a.m., or as soon thereafter as counsel can be heard, for a judgment pursuant to § 298 of the Human Rights Law and pursuant to CPLR Article 78, setting aside the determination and order made by respondents dismissing petitioner's complaint of an unlawful discriminatory practice and denying his reinstatement as a piping analytical engineer with Chemical Construction Corporation, and compelling said respondents to reinstate petitioner as such engineer, and awarding his back pay, and

for such other and further relief as may be deemed just and proper.

Dated: December 5, 1977
New York, N.Y.

Yours, etc.

RUBIN KREMER
c/o R. Garkawe
2120 Wallace Ave.
Apt. 2B
Bronx, New York
10462

Tel.: 892 1322

TO: Chemical Construction
Corporation
Mr. Don Steenland,
Personnel Director
One Penn Plaza
New York, N.Y. 10001

State Human Rights Appeal
Board
Two World Center, 82nd Floor
New York, N.Y. 10047

Donald M. Crook, Esq.
Layton & Sherman, Esqs.
50 Rockefeller Plaza
New York, N.Y. 10020

12 Encl. No. 12

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on February 27, 1978

Present-Hon. Francis T. Murphy, Jr., Presiding Justice
Samuel J. Silverman
Herbert B. Evans
Arnold L. Fein
Arthur Markewich Justices

1877

[M-4560]

RUBIN KREMER,

—against—

THE STATE DIVISION ON HUMAN RIGHTS,
THE STATE HUMAN RIGHTS APPEAL BOARD
and CHEMICAL CONSTRUCTION CORPORATION, RESPONDENTS

The above-named petitioner having presented a petition to this Court praying for an order, pursuant to Section 298 of the Executive Law, setting aside and annulling the determination of respondent The State Human Rights Appeal Board dated November 25, 1977, which affirmed an order of the respondent The State Division on Human Rights dated April 28, 1977, dismissing petitioner's complaint and determining there was no probable cause to believe that respondent Chemical Construction Corporation engaged in the unlawful discriminatory practice complained of, and respondent Chemical Construction Corporation having submitted a memorandum in answer to said petition,

Now, upon reading and filing the notice of application, with proof of due service thereof, the petition of Rubin Kremer, verified December 6, 1977, and the memorandum of Rubin Kremer, all read in support of the application, and the memorandum of Messrs. Layton and Sherman in opposition to said application, and after hearing Mr. Rubin Kremer, appearing *pro se*, for the application, and Messrs. Layton and Sherman opposed; and due deliberation having been had thereon,

It is unanimously ordered that the determination of the respondent, The State Human Rights Appeal Board, be and the same hereby is confirmed, without costs and without disbursements.

ENTER:

JOSEPH J. LUCCHI
Clerk

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
NEW YORK DISTRICT OFFICE
90 Church Street, Room 1301
New York, New York 10007
264-7161

Charge No. 021-76-1526

RUBIN KREMER, c/o N. Rosenberg,
762 Brady Ave. Apt. 127,
Bronx, New York 10462, CHARGING PARTY

CHEMICAL CONSTRUCTION CORPORATION,
1 Penn Plaza, New York, N.Y. 10001, RESPONDENT

DETERMINATION

Under the authority vested in me by Section 29 CFR 1601.19(b)(d) of the Commission's Procedural Regulations (September 27, 1972), I issue, on behalf of the Commission, the following Determination as to the merits of the subject charge.

Respondent is an employer within the meaning of Title VII of the Civil Rights Act of 1964, as amended, and the timeliness, deferral, and all other jurisdictional requirements have been met. Substantial weight has been accorded to the findings of the New York State Division of Human Rights, which are attached.

Having examined the New York State Division of Human Rights' findings and the record presented, I conclude that there is not reasonable cause to believe that the charge is true.

This determination concludes the Commission's processing of the subject charge. The Charging Party may pursue this matter further, if so desired, by filing a

private action in Federal District Court within 90 days of receipt of this letter, and by taking the other procedural steps set out in the enclosed NOTICE OF RIGHT TO SUE.

FOR THE COMMISSION:

/s/ Arthur W. Stern
Arthur W. Stern
District Director

Date May 11, 1978

Enclosures: 706 Agency Findings &
Notice of Right to Sue

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Dismissal)

TO:

Rubin Kremer
c/o N. Rosenberg
762 Brady Ave. Apt. 127
Bronx, New York 10462

FROM:

Equal Employment Opportunity Commission
New York District Office
90 Church St., Rm. 1301
New York, N.Y. 10007

CHARGE NUMBER 021-76-1526

EEOC REPRESENTATIVE Arthur W. Stern, District Director

TELEPHONE NUMBER 212 264-7167

(See Section 706(f)(1) and (f)(3) of the Civil Rights Act of 1964 on reverse of this form)

This is your NOTICE OF RIGHT TO SUE. It is issued because the Commission has dismissed your charge. Your charge was dismissed for the following reason:

☐ No jurisdiction, therefore the Commission has no authority to process your charge further.

☒ No reasonable cause was found to believe that the allegations made in your charge are true, as indicated in the attached determination.

☐ You failed to provide requested necessary information, failed or refused to appear or be available for necessary interviews/conferences or otherwise refused to cooperate to the extent that the Commission has been unable to resolve your charge. You had more than 30 days in which to respond to our final written request.

☐ The Commission has made reasonable efforts to locate you and has been unable to do so. You have had at least 30 days in which to respond to a notice sent to your last known address.

☐ The respondent has made a written settlement offer which affords full relief for the harm you alleged. At least 30 days have expired since you received actual notice of this settlement offer.

The issuance of this NOTICE OF RIGHT TO SUE terminates the Commission's processing of your charge. If you want to pursue your charge further, you have the right to sue the respondent(s) named in your charge in United States District Court. IF YOU DECIDE TO SUE, YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE TO SUE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-5(f)(1) permits the U.S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U.S. District Court in the form and manner it requires. *Your request to the U.S. District Court should be made well in advance of the end of the 90-day period mentioned above.*

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdic-

tion to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of this Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

/s/ Arthur W. Stern
ARTHUR W. STERN
District Director
(*Typed Name and Title of EEOC Official*)

_____
(Date)

cc: Chemical Construction Corp.
1 Penn Plaza
New York, N.Y. 10001

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
NEW YORK DISTRICT OFFICE
90 Church Street, Room 1301
New York, New York 10007
264-7161

EXPLANATION OF JUDICIAL REVIEW

Under Title VII if the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000 (e) *et seq.*, as amended, the Charging Party has the right to request judicial review[1] of the Commission's processes under the following circumstances:

1. After the Commission has administratively closed the case for lack of jurisdiction, untimely filing or for any other reason.

2. After the Commission has determined that there is no reasonable cause to believe that the alleged violations are true, and has dismissed the charge.

3. After the Commission has determined that there is reasonable cause to believe that the allegations are true, but is unable to affect a voluntary conciliation between the parties.

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[1] Please Note: In case the term "judicial review" is unclear, it simply means instituting an action in the proper federal district court. As a necessary prerequisite or condition for commencing such an action in this court, a Notice of Right to Sue is needed. This Notice may be obtained by a formal request in writing to the District Director in the office where the charge was filed, either from the Charging Party or the attorney representing the Charging Party asking that such Notice be forwarded. It is important that the party making such a request be aware that there is a 90-day limit on the time to file the charge in the court. This 90-day period begins to run from the date that the Notice of Right to Sue is received.

4. Anytime after 180 days (240 days if the complaint has been deferred to a state or local agency) have elapsed since the charge was formally filed with the Commission, whether or not any of the first three situations, outlined above, exist.

A change in our rule and regulations now require a NOTICE OF RIGHT TO SUE to be sent together with a *No Cause Determination;* same is hereby enclosed.

If you need any further information, contact the District Counsel of this office at (212) 264-7167.

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
NEW YORK DISTRICT OFFICE
90 Church Street, Room 1301
New York, New York 10007
264-7161

June 27, 1978

Mr. Rubin Kremer
c/o R. Garkawe
2120 Wallace Avenue, Apt. 2B
Bronx, N.Y. 10462

Re: Kremer v. Chemical Construction
Corporation
Charge No. 021-76-1526

Dear Mr. Kremer:

I am in receipt of your letter of June 15, last, in which you request reconsideration of the Determination rendered in the above-captioned matter.

Section 1601.19b(d) of the Commission's Procedural Regulations provides in pertinent part as follows:

> . . . The determination is final when issued; therefore request for reconsideration will not be granted. The Commission may, however, on its own motion, reconsider its determination at anytime and, when it does so the Commission shall promptly notify the aggrieved person or the person making the charge on behalf of the aggrieved person where applicable, and the respondent . . . of its subsequent decision or reconsideration.

I have reviewed the case file, and have spoken at length with the investigator, with particular emphasis upon the points contained in your communication, and have

concluded that the Determination as rendered is appropriate and correct in all respects. Therefore, in conformity with Section 1601.19b(d), your request for reconsideration is not granted.

Sincerely,

/s/ Arthur W. Stern
ARTHUR W. STERN
District Director

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RUBIN KREMER, PLAINTIFF

vs.

CHEMICAL CONSTRUCTION CORPORATION, DEFENDANT

COMPLAINT—Filed July 14, 1978

COMPLAINT AND MOTION FOR OTHER RELIEF

1. This action is brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, for employment discrimination. Jurisdiction is specifically conferred on this Court by 42 U.S.C. § 20003-5. Equitable and other relief are also sought under 42 U.S.C. 2000e-5(g).

2. Plaintiff(s) is a citizen of the United States and resides at 2120 Wallace Ave. 2B, c/o R. Garkawe, New York, New York 10462, 212-892 1322.

3. Defendant(s) lives at, or its business is located at One Penn Plaza, New York, New York 10001.

4. The address at which I sought employment or was employed by the defendant(s) One Penn Plaza.

5. As nearly as possible, the alleged discriminatory acts occurred: 01, August, 1975.

6. As nearly as possible, I filed charges with the New York State Human Rights Commission or the N.Y.C. Commission on Human Rights regarding Defendant's alleged discriminatory conduct on: May 20, 1976.

7. As nearly as possible, I filed charges with the Equal Employment Opportunity Commission regarding Defendant's alleged discriminatory conduct on: 06, May, 1976.

8. The Equal Employment Opportunity Commission issued the *attached* Notice of Right to Sue letter which was *received* by me on 13, May, 1978.

(Note: Please attach a copy of Notice of Right to Sue letter to this Complaint.) (Only *1 copy* of letter is necessary.)

9. The acts I complain of in this suit, concern:

A. X Failure to employ me.

B. X Termination of my employment.

C. — Failure to promote me.

D. — Other acts (Specify): *On June 19, 1975 my performance rating was "Hold for his knowledge and skills". I was given a "below average" performance rating by E. Paul on July 29, 1975 in order to remove me from the Company on August 1, 1975. I was the only Jewish person in the Department. I was 58 of age. There was no lack of work in the piping analytical area. The people hired and rehired in August 1975, were 25-27 of age. In 1975-76 I applied for a job with Chemico, based on their advertisement in The New York Times. Chemico refused to hire me. Mr. Don Steenland Personnel Director of Chemico in his letter to the N.Y.S. Human Rights Division, of September 17, 1976 stated "We would not reemploy him merely for the sake of appearing his claims against Chemico.—When I apply for a job, every interested Company asked permission to contact the previous Company and the Supervisor, and then I receive a non-interest answer. It is my believe that the only reason is the "below average" performance rating and other black-mailing remarks.—The EEOC refused to examine witnesses listed in my brief to the H.R. Appeal Board of May 10, 77, and in my letter to the EEOC of June 15, 1978.*

10. Defendant's conduct is discriminatory with respect to the following:

A. — My race.

B. — My color.

C. — My gender (sex).

D. — My religion

E. — My national origin.

11. I believe that the Defendant or Defendants are still committing these acts against me. X Yes — No. They are not. (Check one).

12. A copy of the charge to the Equal Employment Opportunity Commission is attached to this complaint and is submitted as a brief statement of the facts of my claim.

13. If relief is not granted, Plaintiff will be irreparably denied rights secured by Title VII of the 1964 Civil Rights Act, as amended.

14. Plaintiff(s) has no adequate remedy at law to redress the wrongs described above.

WHEREFORE, Plaintiff(s) prays that the Court grant such relief as may be appropriate, including injunctive orders, damages, costs and attorney's fees.

/s/ Rubin Kremer
RUBIN KREMER

2120 Wallace Ave., 2B
c/o R. Garkawe
Bronx, New York, N.Y. 10462

(212)—892-1322

Enclosures:

1. Notice of Right to Sue
2. Copy of the charge to the EEOC and EEOC Affidavit of May 6, 1976
3. Copy of the letter to the EEOC of June 15, 1978
4. Copy of the letter from the EEOC of June 27, 1978
5. Copy of the letter to the EEOC of December 4, 1977
6. Copy of the letter to the EEOC of March 4, 1977
7. Copy of the letter to the EEOC of April 20, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

78 Civ. 3182 (LWP)

RUBIN KREMER, PLAINTIFF

—against—

CHEMICAL CONSTRUCTION CORPORATION, DEFENDANT

NOTICE OF MOTION TO DISMISS

S I R :

PLEASE TAKE NOTICE that, upon the annexed affidavit of Donald M. Cook, Esq., defendant Chemical Construction Corporation, by its undersigned attorneys, will move this Court, at the Courthouse thereof located at Foley Square, New York, New York, at 9:30 o'clock A.M. on the 20th day of September, 1978, or as soon thereafter as counsel may be heard, for an order pursuant to Rule 12(b) of the Federal Rules of Civil Procedures, dismissing this action on grounds of *res judicata*, or in the alternative, for an order granting summary judgment for defendant, pursuant to Rule 56, on grounds of *res judicata*.

Dated: New York, New York
September 5, 1978

LAYTON and SHERMAN

By: Layton and Sherman
(A Member of the Firm)
Attorneys for Defendant
50 Rockefeller Plaza
New York, New York 10020
(212) 586-4300

TO: RUBIN KREMER
Plaintiff *pro se*
c/o R. Garkawe
2120 Wallace Avenue, Apt. 2B
Bronx, New York 10462

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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78 Civ. 3182 (LWP)

RUBIN KREMER, PLAINTIFF

—against—

CHEMICAL CONSTRUCTION CORPORATION, DEFENDANT

AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

DONALD M. CROOK, being duly sworn, deposes and says:

1. I am an attorney at law, a member of the Bar of this Court and am an associate of the firm of Layton and Sherman, attorneys for defendant Chemical Construction Corporation ("Chemico") in this action. I am fully familiar with all facts and circumstances concerning this action.

2. I make this affidavit in support of Chemico's motion for an order pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, dismissing this action on grounds of *res judicata*, or, in the alternative, for an order granting summary judgment for defendant pursuant to Rule 56, on grounds of *res judicata*.

3. Plaintiff Rubin Kremer brings this action pursuant to Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000(e)(5) and 2000(e)(5)(g), alleging that Chemico's "failure to employ me" and "termination of my employment" (Complaint ¶ 9) were "discriminatory with respect to . . . my religion [and] my national origin."

(Complaint ¶ 10). (A copy of the Complaint in this action, together with all of the exhibits thereto, are attached hereto as Exhibit "A".)

4. The issues raised by these allegations are in all respects identical to those which Mr. Kremer has previously unsuccessfully litigated against Chemico in the Courts of the State of New York. Indeed, the very documents annexed by Mr. Kremer to his Complaint in this action consist entirely of the various records and correspondence produced during the course of his prior litigation of these claims against Chemico.

5. On or about May 20, 1976, Mr. Kremer, a former employee of Chemico, filed a complaint (a copy of which is annexed hereto as Exhibit "B") with the New York State Division of Human Rights (the "Division") alleging that Chemico had unlawfully dismissed him and refused to rehire him on grounds of "religious creed" and "national origin." By a Determination and Order dated April 28, 1977 (a copy of which is annexed hereto as Exhibit "C"), the Division found that there existed "no probable cause" to support Mr. Kremer's allegations of discrimination. The documents and records attached to the Complaint were, in their entirety, before the Division and comprised the record in this case before the New York courts.

6. Mr. Kremer then, pursuant to N.Y. Exec. Law § 297(a) (McKinney's 1972), appealed the decision of the Division to the State Human Rights Appeal Board (the "Board"), which in an order dated November 25, 1977 (a copy of which is annexed hereto as Exhibit "D") fully affirmed the Determination and Order of the Division, finding, *inter alia*, that the Division's ruling had not been "arbitrary, capricious or an abuse of discretion."

7. Finally, by a Petition dated December 5, 1977 (a copy of which is annexed hereto as Exhibit "E"), Mr Kremer appealed the Order of the Board to the Appellate Division, First Department, of the Supreme Court

of the State of New York. By a unanimous decision and order dated February 27, 1978 (a copy of which is annexed hereto as Exhibit "F") the Court affirmed the determination of the Board. No appeal of this decision was taken to the Court of Appeals of New York.

8. Mr. Kremer had instituted the above-described proceedings before the New York administrative agencies and courts after first filing a Charge of Discrimination (a copy of which is annexed hereto as Exhibit "G") with the Equal Employment Opportunity Commission (the "EEOC") on or about May 6, 1976. On May 11, 1978, the EEOC issued a Determination and Notice of Right to Sue (a copy of which is annexed hereto as Exhibit "H") that "there is not reasonable cause to believe that the charge is true."

9. On August 18, 1978, Chemico noticed a motion, returnable on September 1, 1978, for an order enlarging the period of time in which it might answer or move with respect to the Complaint in this action to, and including, September 22, 1978. Because it was possible to prepare the present motion more quickly than earlier anticipated, Chemico can now submit it before September 22, 1978.

10. WHEREFORE, defendant Chemico respectfully requests that this motion to dismiss on grounds of *res judicata* be granted in all respects.

/s/ Donald M. Crook
DONALD M. CROOK

Sworn to before me this 5th day of September, 1978.

/s/ Dorothy Santucci
DOROTHY SANTUCCI
Notary Public

UNITED STATES DISTRICT COURT
S.D. NEW YORK

No. 78 Civ. 3182

RUBIN KREMER, PLAINTIFF

v.

CHEMICAL CONSTRUCTION CORP., DEFENDANT

Dec. 7, 1978

OPINION AND ORDER

PIERCE, District Judge.

The plaintiff, Rubin Kremer, instituted this pro se action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The plaintiff alleges that the defendant, Chemical Construction Corp. ("Chemico"), both discharged him and failed to rehire him because of his religion and national origin. The defendant has moved for dismissal under Fed. R. Civ. P. 12(b) or, alternatively, for summary judgment under Rule 56 on the ground of res judicata. For the reasons that follow, the Court finds that the plaintiff is entitled to a de novo hearing on the claims presented to the Court as provided for in 42 U.S.C. § 2000e-5 and therefore denies defendant's motion.

FACTS

The plaintiff, a former employee of Chemico, alleges that he was terminated by the defendant on August 1, 1975, because of his national origin and his adherence to the Jewish religion. He also alleges that Chemico refused to rehire him later because of his national origin and religion. These alleged discriminatory acts are prohibited by both federal and state laws. 42 U.S.C. § 2000e

2(a)(1) (1970); N.Y. Exec. Law § 296(1) (McKinney Supp. 1977).[1]

The plaintiff filed a discrimination charge with the Equal Employment Opportunity Commission ("EEOC") on May 6, 1976, within the filing period. The EEOC referred the matter to the New York State Division of Human Rights ("HRD") as mandated in 42 U.S.C. § 2000e-5(c).[2] HRD is the state agency charged with the

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[1] 42 U.S.C. § 2000e-2(a) provides:

"It shall be an unlawful employment practice for an employer— (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin; . . . ."

N.Y. Exec. Law § 296(1) provides:

"It shall be an unlawful discriminatory practice: (a) For an employer or licensing agency, because of the age, race, creed, color, national origin, sex, or disability, or marital status of any individual, to refuse to hire or employ or to bar or discharge from employment such individual. . . ."

[2] 42 U.S.C. § 2000e-5(c)

"In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided . . ."

Also see 29 C.F.R. 1601.12(b)(1)(iii, iv) (1977)

"The aggrieved party and any person filing a charge on behalf of an aggrieved party shall be notified, in writing, that the document which he or she sent to the Commission has been forwarded to the State or local agency . . . and that unless the Commission is notified to the contrary, on the termination of State or local proceedings, or after 60 . . . days have passed,

enforcement of state law prohibiting employment discrimination. That agency reviewed the complaint which alleged age as well as religious discrimination. New York's statute expressly prohibits age discrimination whereas Title VII does not. *Compare* 42 U.S.C. § 2000e-2 (a)(1) *with* N.Y. Exec. Law § 296(1) (McKinney Supp. 1977).

On March 4, 1977, while the matter was still pending before HRD, the plaintiff again requested EEOC to investigate his claim because of the state's delay in resolving his claims. HRD subsequently reached a determination on April 28, 1977 that the plaintiff's claims were meritless. Its determination was based on the findings that the plaintiff was not rehired because one employee who was rehired had greater seniority than the plaintiff, that another employee who was rehired filled a lesser position than that previously held by the plaintiff, and that the plaintiff's creed and age were not factors considered in Chemico's selection. HRD did not, however, make an express finding that his creed and age were not factors considered by Chemico in its decision to discharge him. On administrative appeal, HRD's determination was affirmed on November 25, 1977 by the State Human Rights Appeals Board on the grounds that HRD's findings were not arbitrary or capricious.

The plaintiff then appealed the decision to the New York State Supreme Court, Appellate Division, First Department, under N.Y. Exec. Law §§ 296-298. That intermediate appellate court affirmed the decision on February 27, 1978. The matter was not appealed further.

On May 11, 1978, the EEOC reviewed the HRD's findings, the complaint, and the record and determined that

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whichever occurs first, the Commission will consider the charge to be filed with the Commission and commence processing the case. . . ."

"Upon notification of the termination of State or local proceedings or the expiration of 60 (or 120) days, whichever occurs first, the Commission will consider the charge to be filed with the Commission and will commence processing the case."

there was no reasonable cause to believe that the plaintiff's claims were valid. It then issued a notice of right to sue. Plaintiff subsequently instituted this action pro se, and requested a de novo trial under Title VII.

DISCUSSION

The issue presented to the Court by the instant motion to dismiss the complaint or, in the alternative, for summary judgment is whether the prior state appellate court review of the state agency's action under state law bars a federal action under Title VII.

Chemico urges this Court to adopt the approach followed in *Mitchell* v. *National Broadcasting Co.*, 553 F.2d 265 (2d Cir. 1977) and dispose of this motion similarly. In *Mitchell*, the plaintiff had instituted an action under 42 U.S.C. § 1981, but prior to instituting the federal action the plaintiff had brought an action under the N.Y. Human Rights Law with HRD. Only after she was denied relief and after instituting an appeal from HRD's decision with the Appeals Board did that plaintiff seek federal relief by filing a charge of discrimination with the EEOC. The EEOC issued a finding of no probable cause after HRD's determination was affirmed by the Appeals Board and the Appellate Division.

The plaintiff then instituted an action under § 1981 in federal court, but the action was dismissed on the ground of res judicata. On appeal, the Court of Appeals held that the federal action was indeed barred by res judicata because the plaintiff had sought state court review of the state agency determination. *Id.* at 276. However, it expressly reserved judgment on the question of whether the principle of res judicata would bar a similar action under Title VII. *Id.* at 275 n.13.

In comparison, the plaintiff in this action initially filed a complaint with the EEOC, was referred to HRD, and resumed his request that the EEOC investigate his charges prior to HRD reaching its conclusion. Like the complaint in *Mitchell*, the plaintiff, commenced this action in federal court after failing in his appeal to the

state Appellate Division regarding the Appeals Board's affirmance of the HRD determination.

The similarity of the facts of the instant action to those in *Mitchell*, Chemico contends, is sufficient to justify a ruling similar to that in *Mitchell*, particularly since Title VII does not require exhaustion of state judicial remedies prior to instituting federal claims and since the plaintiff chose not to appeal the Appellate Division's affirmance to the New York State Court of Appeals. While Title VII does require that the EEOC defer complaints to HRD, 42 U.S.C. § 2000e-5(c) (1970), it does not require that complainants exhaust state judicial remedies before seeking federal relief. On the contrary, Title VII allows the filing of a complaint with the EEOC 60 days after proceedings are initiated under state law. *Id.* Chemico contends that if the plaintiff had sought federal relief immediately after the ruling from the HRD and from the State Appeals Board rather than appealing to the state court, his right to a de novo federal trial would have been preserved. *See, Voutsis* v. *Union Carbide Corp.*, 452 F.2d 889 (2d Cir.), *cert. denied*, 406 U.S. 918, 92 S.Ct. 1768, 32 L.Ed.2d 117 (1971); *Batiste* v. *Furnco Construction Corp.*, 503 F.2d 447 (7th Cir.), *cert. denied*, 420 U.S. 928, 95 S.Ct. 1127, 43 L.Ed.2d 399 (1975).

In determining that state court review barred a subsequent federal court action under § 1981, the Court in *Mitchell* stressed that § 296 of the New York Executive Law is at least as broad as the federal constitution and civil rights laws in prohibiting discrimination in employment. 553 F.2d at 269-70, that the issues addressed in the state proceedings were the same as those before the district court, *id.* at 270, that the standard for evaluating the plaintiff's claim under state law is comparable to that for evaluating a summary judgment motion in the federal courts, *id.* at 271, and that the New York state courts are not less capable than federal courts in resolving the legal sufficiency of a complaint or less sensitive to claims under the State Human Rights Law which

may also be actionable under federal statute. *Id.* at 276. The issue to be determined here is whether these considerations compel a finding of a similar bar of actions brought under Title VII.[3]

The principles of collateral estoppel and res judicata are made applicable to federal courts with respect to prior state court judgments by 28 U.S.C. § 1738. That statute obligates the federal courts to give full faith and credit to judgments of state courts of competent jurisdiction.[4] The federal court, however, need only give that state judgment the same effect as it would be given in the state in which it was rendered. *Mitchell* v. *National Broadcasting Co.*, 553 F.2d at 274.[5] Ordinarily, this requires an analysis of the res judicata effect of the state court proceedings within the state and an examination of the local law of res judicata and collateral estoppel. *Winters* v. *Lavine*, 574 F.2d at 52 (2d Cir. 1978).

While section 1738 mandates an analysis and application of the state doctrines of res judicata and collateral estoppel, other considerations must also be evaluated.

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[3] A review of decisions of sister courts in other circuits has revealed sharply conflicting opinions. *Compare Beck* v. *Mather*, 417 F. Supp. 648 (W.D. Va. 1976) (prior state court dismissal not res judicata) with *Bennun* v. *Board of Governors*, 413 F. Supp. 1274 (D.N.J. 1976) (prior state court determination is res judicata).

[4] 28 U.S.C. § 1738 extended the Full Faith and Credit provisions of the U.S. Constitution Article 4, § 1 to all courts, federal as well as state. *Davis* v. *Davis*, 305 U.S. 32, 40, 59 S.Ct. 3, 6, 83 L.Ed. 26, 29 (1938). *Also see Winters* v. *Lavine*, 574 F.2d 46, 54 (2d Cir. 1978); *American Manufacturers Mut. Ins. Co.* v. *Rozands*, 462 F.2d 688, 690 (5th Cir.), *cert. denied*, 409 U.S. 1040, 93 S.Ct. 524, 34 L.Ed.2d 489 (1972).

[5] *But see* Theis, *Res Judicata in Civil Rights Act Cases: An Introduction to the Problem*, 70 Nw. U.L. Rev. 859, 876 "Although section 1738 counsels the federal judge to resolve all res judicata problems in all cases as would a state judge, this admonition is unrealistic and impossible when the federal judge exercises a concurrent jurisdiction granted for special reasons."

As the *Mitchell* court noted, even if a state court's determination had a res judicata or collateral estoppel effect on other courts of that state, federal courts are not always bound by such prior state decisions. " 'Other well-defined federal policies, statutory or constitutional, may compete with those policies, underlying [28 U.S.C. §] 1738 [which provides that the federal courts give full faith and credit to judgments of state courts of competent jurisdiction].' " *Id.* at 274 (citing *American Mannex Corp.* v. *Rozands*, 462 F.2d 688, 690 (5th Cir.), *cert. denied*, 409 U.S. 1040, 93 S.Ct. 524, 34 L.Ed.2d 489 (1972)). Especially in civil rights actions, the res judicata and collateral estoppel requirements of § 1738 have not been rigidly applied. *See Mitchell, supra* at 274; *McCune* v. *Frank*, 521 F.2d 1152, 1156 n.10 (2d Cir. 1975); *also see* discussion in *Winters, supra* at 56. But the mere fact that a federal civil rights action is involved is not sufficient reason to deny a state court determination the full faith and credit required by § 1738. *Mitchell* v. *National Broadcasting Co., supra.*

Recent decisions in this circuit have supported the conclusion that state court determinations have res judicata or collateral estoppel effect on subsequent federal civil rights actions. *Winters* v. *Lavine, supra; Mitchell* v. *National Broadcasting Co., supra. Winters* was an action under 42 U.S.C. § 1983 (*accord Hammer* v. *Town of Greenburgh*, 440 F. Supp. 27 (S.D.N.Y. 1977)) and *Mitchell* was instituted under 42 U.S.C. § 1981. Several distinctions exist, however, between the statutes under which those cases were tried and Title VII. Under Title VII, the statutory prerequisite for instituting an action in federal court is that the complainant first submit his claim to state and federal agencies. 42 U.S.C § 2000e-5, *supra.* This requirement is not present under § 1981 or § 1983. The purpose of this requirement is to permit the state agency to attempt to resolve the matter under state law through voluntary conciliation and persuasion. *Alexander* v. *Gardner-Denver*, 415 U.S.

36, 44, 94 S.Ct. 1011, 1017, 39 L.Ed.2d 147, 156 (1974); 29 C.F.R. 1601-12(a) (1977). Furthermore, Title VII provides for a de novo hearing by a federal court once the statutory prerequisites have been met. The Court must be mindful of these distinctions and their implications in evaluating the applicability of the holdings in *Winters* and *Mitchell* to the action at bar and in assessing the federal policies embodied in Title VII.

A review of the history of Title VII indicates that Congress intended the policy against discrimination, as manifested in the Civil Rights Act of 1964, be given the highest priority. *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968) (per curiam). "Consistent with this view, Title VII provides for consideration of employment discrimination claims in several forums .... And, in general, submission of a claim to one forum does not preclude a later submission to another. Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. at 47-49, 94 S.Ct. at 1019-1020, *accord*, 29 C.F.R. 1601.12(a) (1977). Accordingly, Title VII actions should not be subject to the collateral estoppel effects of section 1738 where the result would be the possible frustration of the congressional objectives embodied in Title VII, to wit, the availability of separate federal and state remedies and the independent adjudication of federal claims.

An earlier Title VII case involving circumstances similar to those presented in the action at bar discussed these policy considerations. In *Benneci* v. *Dep't of Labor*, 388 F. Supp. 1080 (S.D.N.Y. 1975), the plaintiff claimed that the defendant had engaged in unlawful employment discrimination and discriminated against him because of

his religion and national ancestry in violation of New York's Human Rights Law. After HRD determined that there had been no unlawful discriminatory practice, he appealed to the Appeals Board which affirmed. Benneci then appealed to the state appellate court which also affirmed. Having failed to secure relief from the state, he filed a complaint with the EEOC. When the EEOC determined that there was no reasonable cause to believe that an unlawful practice had been engaged in, plaintiff brought his action in federal court.

In refusing to give the state court's affirmance res judicata effect, the district court judge discussed the congressional objectives embodied in Title VII. In his opinion, Judge Knapp cited the Supreme Court's unanimous decision in *Alexander* v. *Gardner-Denver Co., supra,* wherein it was noted that the purpose of Title VII was to assure equality of employment opportunities through cooperation and voluntary compliance. Title VII incorporates a procedure whereby existing state and local agencies as well as the EEOC would have an opportunity to settle disputes before the complainant was permitted to commence an action in federal court. The court in *Benneci* reasoned that to grant defendant's motion for summary judgment because the plaintiff had sought to comply with these procedures would defeat the general purpose of the statutory scheme. 388 F. Supp. at 1081. Furthermore, where the complainant has manifested a preference for the federal forum by initiating his action with EEOC rather than the state agency, he may be less inclined to actively and fully pursue his state claim, as envisioned by the statutory scheme, or to seek review of arbitrary state agency actions, if a possible loss of his federal claim would result. This statutory scheme is unique to Title VII actions and manifests Congress' intent that there be an initial resort to state remedies. A bar of a federal action because of collateral estoppel may well frustrate this congressional purpose. Consequently, a complainant's resort to state court review should not bar

a Title VII action as it would under other federal civil rights statutes.

A further reason for distinguishing an action under Title VII from actions under other federal civil rights statutes is that Title VII expressly provides for a de novo hearing by a federal court. Although state courts may be said to be as capable of evaluating claims of discrimination as federal courts, where the reviewing state court does not have plenary power to try the matter anew, the barring of an independent federal action on grounds of collateral estoppel would have the effect of limiting the availability of a de novo hearing. Such a holding would impliedly restrict the express provision for a second independent hearing to those instances where the state proceedings had been terminated without state court review. There being no limitation of this nature on the availability of a de novo hearing imposed by the Congress, the insertion of a qualification by judicial fiat is unwarranted.

CONCLUSION

While *Benneci* was decided prior to the decision in *Mitchell*, the reasoning of *Benneci* is consistent with the later analysis of the Second Circuit Court of Appeals in *Mitchell*. The policy embodied in Title VII was intended to be effectuated by the entire procedure set forth in § 2000e-5 including the provision for a second, independent federal hearing. Truncating the procedure on the grounds of res judicata under these circumstances is not mandated by *Mitchell* and would be contrary to the apparent intent of Congress.

Accordingly, the defendant's motion to dismiss or, alternatively, for summary judgment is denied.

SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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78 Civ. 3182 (LWP)

RUBIN KREMER, PLAINTIFF

-against-

CHEMICAL CONSTRUCTION CORPORATION, DEFENDANT

ANSWER—Filed March 1, 1979

Defendant Chemical Construction Corporation, by its undersigned attorneys, for its answer to the Complaint of plaintiff Rubin Kremer:

1. Admits the allegations contained in Paragraphs 1, 3, 4, 6, and 12 of the Complaint, except as to Paragraph 12, denies knowledge or information sufficient to form a belief as to whether said charge is submitted as a brief statement of the facts of plaintiff's claim.

2. Denies the allegations contained in Paragraphs 9, 10, 13 and 14 of the Complaint.

3. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraphs 2, 5, 7, 8 and 11 of the Complaint.

FIRST AFFIRMATIVE DEFENSE

4. The Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

5. This action is barred by the principles of *res judicata* and collateral estoppel.

WHEREFORE, defendant respectfully requests that the Complaint be dismissed and that it be awarded such other and further relief as to the Court may appear just, including its costs and disbursements of this action.

Dated: New York, New York

February 27, 1979

LAYTON AND SHERMAN

By /s/ David Loeffler
(A member of the firm)

Attorneys for Defendant
50 Rockefeller Plaza
New York, New York 10020

(212) 586-4300

Affidavit of Service by Mail (omitted in printing)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 78 Civ. 3182

RUBIN KREMER, PLAINTIFF

v.

CHEMICAL CONSTRUCTION CORP., DEFENDANT

September 20, 1979

As Amended October 2, 1979

OPINION

SOFAER, District Judge:

This is an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Plaintiff Kremer claims he was discharged and has not been rehired by defendant Chemical Construction Corp. (Chemico) because of his religion (Jewish) and national origin. He filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC) on May 6, 1976. EEOC referred the matter to the New York State Division of Human Rights (NYHRD), as mandated. 42 U.S.C. § 2000e-5(c). NYHRD concluded that plaintiff had failed to establish probable cause to believe that Chemico had engaged "in the unlawful discrimination practice complained of," and made findings that plaintiff had not been rehired for lawful reasons.[1] No ex-

[1] The determination recited:

> The record shows that this complainant was not rehired by the respondent employer because one employee with greater seniority was chosen.
>
> The other person that was rehired, [sic] filled a lesser position than that held by complainant.
>
> Complainant's creed, or age, was not a factor in these selections.
>
> The complaint is therefore ordered dismissed, and the file is closed.

"Determination after Investigation," NYHRD, April 28, 1977, Exhibit C, Defendant's Motion to Dismiss, Sept. 5, 1978.

press findings were made with respect to Kremer's initial discharge.[2] The papers filed by Kremer indicate, however, that the evidence of discrimination on rehiring is more substantial than the evidence advanced on the illegality of the initial discharge. The NYHRD seems therefore to have impliedly rejected plaintiff's additional claims. On November 25, 1977, the NYHRD's determination was upheld by its Appeal Board as "not arbitrary, capricious or an abuse of discretion."

Plaintiff then appealed to the Appellate Division, First Department, for a judgment pursuant to § 298 of the Human Rights Law and pursuant to CPLR Article 78. He offered all the evidence and arguments there that he has most recently advanced in this court. The decision was unanimously "confirmed" by five Justices on February 27, 1978. Plaintiff again petitioned the EEOC for relief. On May 11, 1978, the EEOC found no probable cause to believe plaintiff's claims, but it confirmed (on the usual printed form) a right to "pursue this matter further, if so desired, by filing a private action in Federal District Court within 90 days."[3] This action followed.

Chemico has argued from the outset of this litigation that plaintiff's Title VII claims are barred by res judicata. Defendant formally moved for dismissal on September 5, 1978, basing its argument primarily on *Mitchell* v. *National Broadcasting Co.*, 553 F.2d 265 (2d Cir. 1977). *Mitchell* was an action under 42 U.S.C. § 1981 by a black woman claiming racial discrimination by her employer. Like Kremer, she was denied relief by the NYHRD, unsuccessfully sought review by its Appeal Board, and then applied to the Appellate Division, First Department, which unanimously confirmed. *Mitchell* thereafter applied to the EEOC. After the EEOC found no probable cause, she sued in federal

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[2] Id., Exhibit C.

[3] Id., Exhibit H.

court under 42 U.S.C. § 1981. The only significant difference, therefore, between *Mitchell* and the present case is that plaintiff Kremer sues in the federal courts under Title VII, whereas Mitchell sued under § 1981.

The Second Circuit held in *Mitchell* that a federal action under § 1981 was barred under principles of res judicata. In so holding, the court found it necessary to distinguish its earlier decision in *Voutsis* v. *Union Carbide Corp.*, 452 F.2d 889 (2d Cir. 1971), *cert. denied*, 406 U.S. 918, 92 S.Ct. 1768, 32 L.Ed.2d 117 (1972), which held that resort to a state agency to test a racial discrimination claim does not bar a subsequent federal suit under Title VII.[4] Because the plaintiff in *Mitchell* had gone one step beyond the state agency level by seeking limited review in the state courts by way of an Article 78 proceeding, a majority of the Second Circuit panel concluded that the sate decision should be accorded the same res judicata effect it would have in the New York State courts.[5]

The plaintiff in *Mitchell*, though suing under § 1981, argued that to apply res judicata to her case would conflict with the legislative scheme of Title VII. But the court disagreed. The federal interest in encouraging deferral of civil rights claims to state adjudication applied only, the court found, to state agencies where conciliation

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[4] In *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974), the Supreme Court cited the *Voutsis* decision with approval, noting that "[m]ost courts have recognized that the doctrine of election of remedies does not apply to suits under Title VII", at 49 n. 11, 94 S.Ct. at 1020. *See also Cooper* v. *Philip Morris, Inc.*, 464 F.2d 9 (6th Cir. 1972).

[5] Because *Mitchell* sought relief in the federal court on the same grounds as the state court, the court reasoned that she had had her "day in court." The fact that no opportunity for a formal evidentiary hearing had been afforded did not, in the court's view, preclude application of res judicata so long as there was an identity of issues and the plaintiff had had the right to appear and an opportunity to be heard. 553 F.2d at 271.

of civil rights claims is attempted. "Once review of a state agency determination is sought in the state courts, however, these considerations disappear." 553 F.2d at 275. This result, the court stated, allows state agencies to apply their expertise in discrimination claims and at the same time affords a federal remedy to claimants who choose to sue in the federal courts rather than seek review in the state courts. *Id.* at 265.

Judge Feinberg dissented in *Mitchell*. He concluded that if res judicata applied in an action under 42 U.S.C. § 1981, it should also apply to a claim under Title VII, a result he found unacceptable. He reasoned that, since Congress had provided for a de novo hearing of all Title VII cases in the federal courts after both state and federal agency determinations, it made no sense to deprive a complainant of de novo because he or she pursued an additional, limited review in the state courts. He noted that Congress had provided in civil rights cases for considerable duplication and overlapping of remedies, and that this legislative purpose should not be overridden by judicial resort to the normal but inapposite policy against repetitious litigation. *Id.* at 277-80; *see* 28 U.S.C. § 1738.

Despite *Mitchell*, defendant's motion to dismiss in this case was denied by Judge Lawrence W. Pierce on December 7, 1978.[*] Judge Pierce essentially adopted Judge Feinberg's reasoning in *Mitchell*, but concluded that the specific statutory grant of de novo federal review in Title VII justified distinguishing, for res judicata purposes, cases under Title VII from cases under the other civil rights statutes. He agreed also with Judge Whitman Knapp's opinion in *Benneci* v. *Department of Labor*, 388 F.Supp. 1080 (S.D.N.Y.1975). To apply res

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[*] Further indication of the Second Circuit's attitude on repetitious litigation was provided by the intervening decision in *Winters* v. *Lavine*, 574 F.2d 46 (2d Cir. 1978), applying collateral estoppel in an action under 42 U.S.C. § 1983.

judicata to Title VII cases, Judges Pierce and Knapp concluded, would defeat the general purposes of the statutory scheme as construed by a unanimous Supreme Court in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974). "Such a holding would impliedly restrict the express provision for a second independent hearing to those instances where state proceedings had been terminated without state court review. There being no limitation of this nature on the availability of a de novo hearing imposed by Congress, the insertion of a qualification by judicial fiat is unwarranted." *Kremer* v. *Chemical Construction Co.*, 464 F.Supp. 468, 473 (S.D.N.Y.1978).

On June 12, 1978, however, the Second Circuit extended the *Mitchell* rule to Title VII cases. In a *per curiam* opinion, it held that res judicata would bar a Title VII claim where the plaintiff had previously sought state court review on the same question presented to the federal courts. The panel saw "no reason to distinguish between Section 1981 and Title VII for res judicata purposes." Without discussion of the de novo review requirement of Title VII, *Mitchell* was deemed to control. "The crucial factor is that appellant chose to submit her case to the state *courts* for review and she cannot now relitigate the same issues in federal court." *Sinicropi* v. *Nassau County*, 601 F.2d 60 at 62 (2d Cir. 1979). (Emphasis in original.) Judge Feinberg, who dissented in *Mitchell*, agreed its reasoning required dismissal of Title VII cases, as he had predicted.

Sinicropi permits no choice but to dismiss plaintiff's complaint in this case on grounds of res judicata. Plaintiff urges what he regards as distinguishing features: perfunctory treatment by the NYHRD and an order by the Appellate Division that misleads by reciting that plaintiff appeared and argued in his behalf. These deficiencies, however, are less substantial than—though similar to—the deficiencies raised by the plaintiff in *Mitchell*. See 553 F.2d at 268 (lack of witnesses, no cross exami-

nation, no counsel). Nor is it significant that the NYHRD's opinion expressly refers only to the plaintiff's claim based on defendant's failure to rehire him; the papers indicate that both the agency and the state court were presented with all aspects of plaintiff's claim of religious discrimination—identical to the claim presented in this court—and they denied relief.

To submit to *Mitchell* and *Sinicropi*, however, is not to agree with them. The *Mitchell* majority's conclusion that Title VII's de novo review is satisfied by a combination of an agency finding of no probable cause coupled with Article 78 review seems fanciful. No amount of judicial explication can alter the reality that a litigant who pursues his civil rights claim in a state court with limited powers of review loses his statutory right to full review in the federal courts. This disparity in remedial opportunity is merely obfuscated by the assertion that agency consideration of probable cause coupled with limited Article 78 review is equivalent to a summary judgment proceeding in federal court and thus satisfies the de novo review requirement. It is well settled that in considering a Title VII claim a federal district court is not bound by administrative findings of fact. *Chandler* v. *Roudebush*, 425 U.S. 840, 844-45, 96 S.Ct. 1949, 48 L.Ed.2d 416 (1976). A Title VII trial may therefore encompass anything reasonably within the scope of an EEOC investigation. *See* Comment, *T'was a Nibble Not a Bite: Res Judicata and Section 1981—Mitchell* v. *National Broadcasting Co.*, 53 N.Y.U.L.Rev. 187, 204-05 (1978). Whether the district court decides the claim on a motion for summary judgment or after a full trial, it is entitled to request additional affidavits and evidence and, if necessary, to hold an evidentiary hearing. *See generally* Wright & Miller, *Federal Practice and Procedure: Civil* § *2721* (1973). By contrast, the New York Appellate Division, like most appellate courts, is limited to the record of facts gathered and evidence presented in the agency proceedings. Comment, *State Appellate Court Judgment on*

Employment Discrimination is Res Judicata in Subsequent Federal Action Under Section 1981 of the Civil Rights Act of 1866, 62 Minn.L.Rev. 987, 1006 (1978). As a result, the appellate court determination is subject to all the procedural infirmities of the administrative proceeding.

Even if state agency and appellate court review were considered sufficiency analogous to federal summary judgment in the abstract, res judicata would still appear an inappropriate mechanism to bar Title VII claims in the federal courts. As the Second Circuit stated in *Voutsis*, *supra*, "[a] federal claim allows the district court to conduct a 'full scale inquiry into the charged unlawful motivation in employment practices' ", 452 F.2d at 893, *quoting Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 715 (7th Cir. 1969). Such a full scale inquiry will often call for a trial on the merits, including independent fact-finding by the federal courts. The *Mitchell* majority correctly argued, of course, that a federal court is empowered to use a summary judgment procedure in all cases where no genuine issue of material fact is presented; in such cases the issues considered in the federal review would be quite similar to the issues considered when a state court "confirms" as reasonable an agency's dismissal for lack of probable cause. But there is a critical difference between the authority of the New York and federal courts in dealing with Title VII issues. A federal court is *permitted* to make a summary judgment disposition of an employment discrimination case. By contrast, the New York Appellate Division in an Article 78 proceeding is *restricted* to using a proceeding similar to summary judgment; it has no authority to determine whether summary judgment is, in a given case, preferable to a full judicial trial on the merits.[7] For this reason, the issues

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[7] *See generally* Comment, *Civil Rights—Civil Procedure: State Appellate Court Judgment on Employment Discrimination is Res Judicata in Subsequent Federal Action Under Section 1981 of the Civil Rights Act of 1866*, *supra*, at 988 nn. 5 & 6. The Appeal Board reviews dismissals for lack of probable cause only to deter-

presented before the state court in an Article 78 proceeding and those before the federal court under Title VII are necessarily dissimilar, thus making the application of res judicata inappropriate. Given the express mandate in Title VII for federal *de novo* review, the federal court would appear obliged to determine independently the nature and extent of review necessary to protect a claimant from employment discrimination. *Mitchell* and *Sinicropi* foreclose the federal courts from considering this important question.[8]

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mine whether the action of the NYHRD was "arbitrary and capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion." *Mayo* v. *Hopeman Lumber & Mfg. Co.*, 33 A.D.2d 310, 313, 307 N.Y.S.2d 691, 694, *appeal dismissed*, 26 N.Y.2d 962, 311 N.Y.S.2d 5, 259 N.E.2d 477 (1970). Even if the Board determines that there is a genuine factual dispute over a key issue, it may not reverse the NYHRD's dismissal for lack of probable cause. *See Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *State Div. of Human Rights*, 48 A.D.2d 391, 370 N.Y.S.2d 96 (1975) (per curiam). Nor is it empowered to find new facts. *See State Div. of Human Rights* v. *Columbia Univ.*, 39 N.Y.2d 612, 616, 385 N.Y.S.2d 19, 21, 350 N.E.2d 396, 398 (1976), *cert. denied*, 429 U.S. 1096, 97 S.Ct. 1112, 51 L.Ed.2d 543 (1977).

The Appellate Division's scope of review in an Article 78 proceeding has been held to be no broader than that of the Appeal Board. *See Mize* v. *State Div. of Human Rights*, 33 N.Y.2d 53, 57, 349 N.Y.S.2d 364, 367-68, 304 N.E.2d 231, 233 (1973). Thus, in reviewing the state agency determinations, it seems that the Appellate Division can at most reverse and remand for a hearing or further investigation by the agency. *See Mitchell, supra*, 553 F.2d at 272 n. 9, *citing Mayo* v. *Hopeman Lumber & Mfg. Co., supra*.

In justifying application of res judicata in *Mitchell*, the majority apparently relied on the fact that Second Circuit courts have on occasion given res judicata effect to Article 78 judgments. 553 F.2d at 272 n. 9. None of the cases cited by the majority, however, involved the resolution of employment discrimination or similar claims where Congress expressly provided for *de novo* federal court review.

[8] This court concedes that it may not always be inappropriate for a federal court to give res judicata effect to a state court's disposition of an employment discrimination claim. As two com-

A primary concern of the *Mitchell* majority was the need to enhance comity between the state and federal courts. Yet, as the *Mitchell* majority concedes, comity in our federal system must always begin with a proper implementation of our national legislature's will. Otherwise, the concept might be used to create a preference for adjudicating at least some types of federal claims in state rather than federal court. Where Congress has "long evinced a general intent to accord parallel or overlapping remedies against discrimination," *Alexander* v. *Gardner-Denver Co., supra*, 415 U.S. at 47, 94 S.Ct. at 1019, a preference for state resolution of such claims seems especially inappropriate. Furthermore, comity has generally been understood to require deference to state decisions based on the same scope of review applied in comparable federal proceedings. It seems a strange version of comity to require a federal court to relinquish an obligation to grant de novo review on the ground that a state court has granted limited review of a state agency decision. One wonders, moreover, why comity will be served if, as seems likely, individuals with civil rights claims will strive to avoid the state courts in order to preserve their rights to federal forum.

The *Mitchell* majority also wrote of the "interests of judicial husbandry," and "the equity of protecting opposing parties . . . from vexatious duplicative litigation," 553 F.2d at 276-277, *quoting from Thistlewaite* v. *City of New York*, 362 F.Supp. 88, 92 (S.D.N.Y. 1973), *aff'd*, 497 F.2d 339 (2d Cir.), *cert. denied*, 419 U.S. 1093, 95

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mentators have persuasively argued, res judicata effect might properly be accorded when the state proceedings included a trial on the merits, or at least involved summary disposition where there was a possibility of full trial on the merits. Comment, *Civil Rights—Civil Procedure: State Appellate Court Judgment on Employment Discrimination is Res Judicata in Subsequent Federal Action Under Section 1981 of the Civil Rights Act of 1866, supra*, at 1012; Comment, *T'was a Nibble Not a Bite: Res Judicata and Section 1981, supra*, at 214.

S.Ct. 686, 42 L.Ed.2d 686 (1974). Even assuming an adequate basis exists for judicially revising the apparent legislative judgment as to where the balance should be struck on these interests, do considerations of judicial administration and equity truly support the application of res judicata in Title VII cases?

Title VII plaintiffs will still initially seek relief before the NYHRD because the federal statute requires them to do so. Some will still seek review in the state courts on state law grounds, carefully avoiding any mention of their federal claims even though they are before a tribunal compentent to review those claims. Most will avoid the state courts entirely, thus encouraging further deterioration of the state agency process due to much less frequent state court supervision. Furthermore, by discouraging state court review of agency decisions, *Mitchell* and *Sinicropi* may well serve to increase the number of discrimination cases brought in the federal courts. Those plaintiffs who, until *Mitchell* and *Sinicropi*, were satisfied with the handling of their claims by the state courts and sought no federal review will, after those decisions, pursue their claims in federal courts at the outset.[9] Federal courts who hear these claims will no longer have the benefit of state court decisions, which have often been of assistance.

As for the equitable consequences of *Mitchell* and *Sinicropi*, they may create far more unfairness than they

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[9] *Cf. Alexander* v. *Gardner-Denver Co., supra*, where the Supreme Court expressed similar concerns in holding that federal courts should not give res judicata effect to state arbitration determinations. The Court noted that to hold otherwise

> might adversely affect the arbitration system as well as the enforcement scheme of Title VII. Fearing that the arbitral forum cannot adequately protect their rights under Title VII, some employees may elect to bypass arbitration and institute a lawsuit. The possibility of voluntary compliance or settlement of Title VII claims would thus be reduced, and the result could well be more litigation, not less. 415 U.S. at 59, 94 S.Ct. at 1025.

avoid, and proper alternative means for avoiding vexatious, duplicative litigation seem available. First, it seems clear that many civil rights claimants have been misled by prior court decisions, such as *Voutsis*, into believing they could seek limited state court review without losing access to the federal courts. Indeed, in cases such as the present one, the state and federal agencies handling civil rights claims have uniformly assumed that federal review remained available under Title VII irrespective of prior proceedings. For example, after Mr. Kremer had gone to the state agency, sought state review, and then federal agency consideration, the EEOC issued a letter stating that he had a "right to sue" in federal court. There seems little equity in imposing a rule of forfeiture upon applicants such as Kremer under circumstances where even the expert agencies could not have anticipated one. Granted that the unfairness of applying res judicata to Title VII cases is lessened with respect to complainants who seek state court review after *Sinicropi*; yet the fact remains that the individuals who sought review in state court prior to *Sinicropi* have lost their right to federal court consideration of an important federal claim without notice or fault.[10]

The *Mitchell* and *Sinicropi* decisions will also have inequitable results in future cases. Undoubtedly some individuals will continue to seek review of their federal claims in state courts. These will generally be the uninformed parties who are commonly seen as pro se plaintiffs in civil rights cases. Whatever increase is attained in judicial efficiency through finalizing state court decisions is likely to be at the expense of these plaintiffs

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[10] The unfairness of applying *Sinicropi* to plaintiffs such as Kremer was brought home to this court when Mr. Kremer was told his complaint had to be dismissed. He was obviously shocked to discover that he had no right to federal review. He complained that he had gone through all the procedures he had been told to go through, but had never obtained a hearing on his claim.

who will not know they should avoid our sister courts. On the other hand, civil rights defendants will not really be spared vexations, duplicative litigation by *Mitchell* and *Sinicropi*. Knowledgable plaintiffs need dispense with only one of the several stages of litigation available to them, one which to defendants must be the least burdensome stage of all, i.e., a limited review in which the state agency joins the defendant in opposing the plaintiff's contentions.

Greater relief for vexed defendants in Title VII cases is certainly an objective the Circuit Court should strive to secure. Cases brought by individual plaintiffs seem particularly burdensome, and most often meritless. Devices are potentially available, however, that would be more effective in deterring vexatious suits and fairer to plaintiffs than applying the res judicata doctrine. Two particularly promising measures would be to encourage federal district judges to use their power to grant summary judgment on the merits, and to permit them greater authority in frivolous cases to grant costs and counsel fees against the losing plaintiff.

The right to a *de novo* review should not exempt civil rights claimants from the usual requisites of federal litigation, including the need to allege facts sufficient to create a genuine issue of fact as well as a legal theory upon which relief may be granted. We are perhaps too reluctant to give full weight at the pleading stage to the practical reality that, in light of the plaintiff's burden of proof, discrimination cases based essentially on the plaintiff's feelings or suspicions often fail to raise issues of fact worth litigating.[11] Indeed, greater use of summary judgment in employment discrimination cases finds support in the *Mitchell* decision itself. If the court there

[11] One commentator persuasively argues that, where the moving party does not have the trial burden of proof, the summary judgment evidentiary standard should be relaxed. Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 Yale L.J. 745 (1974).

was willing to give full faith and credit to a state procedure which merely resembles federal summary judgment, it should be even more prepared to affirm a federal district court's summary disposition of a Title VII claim, especially since the federal court is free to consider the propriety of a full trial on the merits.

We naturally resist imposing costs and fees on individuals who already carry with them, however unjustifiably in the law's eyes, a feeling of having been greatly wronged. Yet it is here that the courts must show courage and ingenuity. Instead of precluding suits under judicial doctrines such as res judicata, we should use statutorily granted powers to tax costs and fees in cases we have concluded are meritless. *See* 42 U.S.C. § 2000e-5(k). The Supreme Court recently confirmed the propriety of awarding attorney's fees to a Title VII defendant who prevails on the merits. *Christianburg Garment Co.* v. *EEOC*, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978). Although the Court concluded that a more stringent standard should apply to prevailing defendants than would apply to prevailing plaintiffs, the standard articulated by the Court for prevailing defendants seeking attorney's fees is far less stringent than many lower federal courts had assumed. The Supreme Court stated: "[A] district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." 434 U.S. at 421, 98 S.Ct. at 700. With this new standard, the assessment of attorney's fees is now available as a potentially effective device for protecting defendants from the burdens of meritless civil rights claims.

The motion to dismiss is granted, and the complaint is dismissed, without costs to either side.

SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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78 Civil 3182 (ADS)

RUBIN KREMER, PLAINTIFF

—against—

CHEMICAL CONSTRUCTION CORP., DEFENDANT

Defendant having moved the Court to dismiss the complaint, pursuant to Rule 12(b), of the Federal Rules of Civil Procedure, and the said motion having come on before the Honorable Abraham D. Sofaer, United States District Judge, and the Court thereafter on September 20, 1979, having handed down its opinion granting the said motion, it is,

ORDERED, ADJUDGED and DECREED: That the complaint be and it is hereby dismissed, without costs to either side.

Dated: New York, N.Y.
September 24, 1979

/s/ Raymond F. Burghardt
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 773, Docket 79-7748

RUBIN KREMER, PLAINTIFF-APPELLANT

v.

CHEMICAL CONSTRUCTION CORPORATION,
DEFENDANT-APPELLEE

Argued March 12, 1980

Decided June 2, 1980

Before LUMBARD, FRIENDLY and MESKILL, Circuit Judges.

FRIENDLY, Circuit Judge:

Plaintiff Rubin Kremer was employed as an engineer by defendant Chemical Construction Corporation (Chemico). He was laid off, along with a number of other employees, on August 1, 1975. Some of these employees were later rehired but Kremer was not, despite several applications. He claims that the termination and failure to rehire were due to his being of the Jewish faith; Chemico asserts it was due to legitimate business reasons.

Mr. Kremer filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC) under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b), on May 6, 1976. The EEOC, as required by 42 U.S.C. § 2000e-5(c), referred his complaint to the New York State Division of Human Rights (NYHRD). NYHRD conducted an investigation which included examination of documents submitted by Chemico and three interviews with Mr. Kremer. On March 4, 1977, he requested the EEOC to undertake an investigation in light of the lack of progress by NYHRD. On April 28, 1977,

NYHRD issued a Determination After Investigation which stated there was no probable cause to believe that Chemico had engaged in the discriminatory practice charged. Mr. Kremer appealed to the Appeal Board pursuant to N.Y. Executive Law § 297-a on both substantive and procedural grounds, and argued his case both orally and in writing. The Appeal Board affirmed the determination of the Division. Attached to the order of the Appeal Board was a notice that any complainant, respondent or other person aggrieved by the order might obtain judicial review by filing a proceeding in the appropriate Appellate Division within 30 days of service of the order.

Mr. Kremer again brought his complaint to the attention of the EEOC by letter dated December 4, 1977, and also filed, on December 6, 1977, a petition with the Appellate Division of the Supreme Court of New York for the First Department pursuant to § 298 of the N.Y. Human Rights Law and CPLR Article 78 to set aside the adverse determination of the NYHRD. On February 27, 1978, the Appellate Division unanimously ordered that the determination of the Appeal Board be confirmed. Mr. Kremer did not endeavor to obtain review by the New York Court of Appeals. The District Director of the EEOC on May 11, 1978, made a determination concluding that there was not reasonable cause to believe that the charge of discrimination was true and issued a notice of right to sue in a United States district court. After the District Director, having reviewed the case file and spoken with the investigator, denied a request for reconsideration, Mr. Kremer brought this Title VII action in the District Court for the Southern District of New York.

Chemico moved for dismissal of the complaint or summary judgment on the basis that the determination of the Appellate Division constituted a bar under the reasoning of our decision in *Mitchell* v. *National Broadcasting*

Co., 553 F.2d 265 (2 Cir. 1977), where a divided panel held that a similar judgment operated as res judicata with respect to an action under 42 U.S.C. § 1981. Judge Pierce denied the motion in an opinion, 464 F. Supp. 468 (S.D.N.Y. 1978), which sought to distinguish the res judicata effect of a state court determination on an action under Title VII from that upon an action under 42 U.S.C. § 1981, a point left open in the majority opinion in *Mitchell*, 553 F.2d at 275 n.13. Later, after our decision in *Sinicropi* v. *Nassau County*, 2 Cir., 601 F.2d 60, *cert. denied*, 444 U.S. 983, 100 S.Ct. 488, 62 L.Ed.2d 411 (1979), which applied the reasoning of *Mitchell* to a claim under Title VII, Chemico renewed its motion to dismiss or for summary judgment. Judge Sofaer, to whom the case had been transferred, felt constrained to grant the motion but delivered a lengthy opinion, 477 F. Supp. 587 (S.D.N.Y. 1979), devoted mainly to an endeavor to show that the *Mitchell* and *Sinicropi* decisions were in error.

Appealing from the judgment of dismissal, Mr. Kremer, now represented by counsel, seeks reversal on two grounds: One is that *Sinicropi* was wrongly decided; the other is that it should not be applied "retroactively."[1]

This panel cannot properly entertain the claim that *Sinicropi* was wrongly decided. In the absence of any

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[1] While neither Judge Sofaer's opinion nor the brief of counsel for Mr. Kremer suggested that *Sinicropi* was distinguishable, at the oral argument there was some discussion of a possible distinction on the basis that Mr. Kremer had gone initially to the EEOC and was sent to the New York administrative agency by it pursuant to the deferral provision of 42 U.S.C. § 2000e-5(c), whereas Ms. Sinicropi began her proceeding in the NYSHRD. Although this may make Mr. Kremer's case somewhat more attractive, we do not think the distinction has legal significance. Ultimately both claimants brought suit in a federal district court and the question is the binding effect of a determination by the Appellate Division in judicial proceedings initiated by them. If Ms. Sinicropi had gone first to the EEOC, she woud have been sent to the New York administrative agency, exactly as was Mr. Kremer.

decisions by the Supreme Court or our own court in the brief interval since *Sinicropi* was decided that would cast doubt on its viability, and none has been called to our attention, a panel of this court will not overturn a recent decision of another panel, rendered after full consideration of the very point at issue. This is something to be done, if at all, only by the full court sitting en banc. *See United States* v. *Fatico*, 603 F.2d 1053, 1058 (2 Cir. 1979), *cert. denied*, U.S. ——, 100 S.Ct. 1018, 62 L.Ed.2d 755 (1980); *Ingram* v. *Kumar*, 585 F.2d 566, 568 (2 Cir. 1978), *cert. denied*, 440 U.S. 940, 99 S.Ct. 1289, 59 L.Ed.2d 499 (1979); *In re Jaylaw Drug, Inc.*, 621 F.2d 524, 527 (2 Cir. 1980); contrast *United States* v. *Taylor*, 464 F.2d 240, 242-44 (2 Cir. 1972) (1944 decision which was no longer being followed in practice; overruling opinion circulated to and approved by all judges in active service); *Benjamins* v. *British European Airways*, 572 F.2d 913, 916-17 (2 Cir. 1978), *cert. denied*, 439 U.S. 1114, 99 S.Ct. 1016, 59 L.Ed.2d 72 (1979) (reconsideration by panel of two cases decided in the 1950's which appeared inconsistent with more recent decisions on a related subject); *Boothe* v. *Hammock*, 605 F.2d 661, 664 (2 Cir. 1979) (intervening Supreme Court decision).[2] We can be confident that the full court will

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[2] This is the rule in other circuits as well. *See, e.g., United States* v. *Caldwell*, 543 F.2d 1333, 1369 (D.C. Cir.), *cert. denied*, 423 U.S. 1087, 96 S.C. 877, 47 L.Ed.2d 97 (1976) (on petition for rehearing); *United States* v. *Inmon*, 594 F.2d 352, 354 (3 Cir.), *cert. denied*, 444 U.S. 859, 100 S.Ct. 121, 62 L.Ed.2d 78 (1979); *United States* v. *Lewis*, 475 F.2d 571, 574 (5 Cir. 1973); *Timmreck* v. *United States*, 577 F.2d 372, 376 n.15 (6 Cir. 1978), rev'd on other grounds, 441 U.S. 780, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979); cf. Rules of the United States Court of Appeals for the Seventh Circuit, Rule 16 ("A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court . . . shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear in banc the issue of whether the position should be adopted."). The only contrary ex-

have an opportunity to overrule *Sinicropi* if it wishes since counsel for Mr. Kremer advised us that he would seek rehearing en banc if we should affirm.[3]

We likewise reject the alternative argument that the *Sinicropi* decision should not be applied to this case because Mr. Kremer brought his proceeding in the Appellate Division a year and a half before it was rendered. "The general rule of long standing is that judicial precedents normally have retroactive as well as prospective effect." *National Association of Broadcasters* v. *FCC*, 554 F.2d 1118, 1130 (D.C. Cir. 1976). To this general rule the Supreme Court has announced an exception which was defined, with respect to civil cases, in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971):

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either

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pression we have found is in *Speigner* v. *Jago*, 603 F.2d 1208, 1212 n.4 (6th Cir. 1979), *cert. denied*, —— U.S. ——, 100 S.Ct. 1023, 62 L.Ed.2d 758 (1980) ("it would be a waste of judicial time and resources to automatically require an en banc hearing each and every time this Court overrules or modifies one of its previous decisions"). As noted, en banc rehearing is not required "each and every time" a previous panel decision is modified, but only when the basis for overruling the previous decision is simply that it is wrong although nothing new has occurred to show it to be so. The views expressed in *Speigner* were those of Judge Peck alone, since Chief Judge Edwards concurred separately, not finding it necessary to overrule the precedent in question, *id.* at 1215 n.1, and Judge Weick dissented, partly on the ground that "[n]o panel of this Court has the power or right to overrule the decision of another panel." *Id.* at 1217. For an illustration of the difficulties that can arise from panels taking divergent courses, *see Davis* v. *United States*, 417 U.S. 333, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974).

[3] Rehearing en banc was denied in *Sinicropi* itself when no active judge or judge who was a member of the panel requested that a vote be taken pursuant to a petition for rehearing en banc.

by overruling clear past precedent on which litigants may have relied, *see, e.g., Hanover Shoe Inc.* v. *United Shoe Machinery Corp., supra,* [392 U.S. 481] at 496, [88 S.Ct. 2224, 20 L.Ed.2d 1231] or by deciding an issue of first impression whose resolution was not clearly foreshadowed, *see, e.g., Allen* v. *State Board of Elections, supra,* [393 U.S. 544] at 572 [89 S.Ct. 817, 22 L.Ed.2d 1]. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purposes and effect, and whether retrospective operation will further or retard its operation." *Linkletter* v. *Walker, supra,* [381 U.S. 618] at 629 [85 S.Ct. 1731, 14 L.Ed.2d 601]. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano* v. *City of Houma, supra,* [395 U.S. 701] at 706 [89 S.Ct. 1897, 23 L.Ed.2d 647].

Although the Court was not obliged to decide in *Chevron* whether it was necessary to pass each of these hurdles to secure a denial of retroactivity, since it found all the required factors were present, the courts of appeals have held that unless the first factor is satisfied, there is no occasion to consider the other two. *United States* v. *Bowen,* 500 F.2d 960, 975 & n.1 (9 Cir. 1974), aff'd, 422 U.S. 916, 95 S.Ct. 2569, 45 L.Ed.2d 641 (1975); *Ferguson* v. *United States,* 513 F.2d 1011, 1012 (2 Cir. 1973); *Jordan* v. *Weaver,* 472 F.2d 985, 996 (7 Cir. 1973), rev'd on other grounds *sub nom. Edelman* v. *Jordan,* 415 U.S. 651, 658-59 n.7, 94 S.Ct. 1347, 1353-54, 39 L.Ed.2d 662 (1974). This finds support not only in the language of the *Chevron* opinion itself, 404 U.S. at 106, 92 S.Ct. at 355 ("the decision to be applied nonretroactively *must*

establish a new principle of law") (emphasis supplied), *see Jordan* v. *Weaver*, *supra*, 472 F.2d at 996, but also by other Supreme Court decisions analyzing questions of retroactivity. *See, e.g., Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 499, 88 S.Ct. 2224, 2234, 20 L.Ed.2d 1231 (1968) (decisions applied retrospectively because they "did not constitute a sharp break in the line of earlier authority or an avulsive change which caused the current of the law thereafter to flow between new banks"); *Desist* v. *United States*, 394 U.S. 244, 248, 89 S.Ct. 1030, 1032, 22 L.Ed.2d 248 (1969) (retrospectivity analysis appropriate where decision was "a clear break with the past"); *Gosa* v. *Mayden*, 413 U.S. 665, 673, 93 S.Ct. 2926, 2932, 37 L.Ed.2d 873 (1973) (same for "a decisional change in attitude that had prevailed for many decades"). Six months after writing *Chevron*, Justice Stewart wrote that "[a]n issue of the 'retroactivity' of a decision of this Court is not even presented unless the decision in question marks a sharp break in the web of the law." *Milton* v. *Wainwright*, 407 U.S. 371, 381 n.2, 92 S.Ct. 2174, 2180, 33 L.Ed.2d 1 (1972) (Stewart, J., dissenting; the majority did not reach the issue). *See generally Beytagh, Ten Years of Non-Retroactivity: A Critique and A Proposal*, 61 Va. L. Rev. 1557, 1582-83, 1608-09 (1975). Any broader reading of *Chevron* would require courts to engage in the balancing process damaged by the second and third factors whenever a recognized legal principle, here res judicata, had been applied—or not applied—to a situation not precisely covered by previous decision.

Under the first *Chevron* test it is not sufficient that the decision determines a point of law on which the court had not previously passed. In order to invoke nonretroactivity the decision must have established "a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Chevron*, *supra*, 404 U.S.

at 106-07, 92 S.Ct. at 355. *Sinicropi* certainly did not overrule a "clear past precedent on which litigants may have relied." Prior to *Mitchell*, as shown by Judge Feinberg's dissent, 553 F.2d at 277-80, the application of state decisions to actions under various federal civil rights statutes as res judicata in general and under 28 U.S.C. § 1738[4] in particular was an area of considerable turmoil. The specific question decided in *Sinicropi* was expressly left open in *Mitchell*, *supra*, 553 F.2d at 275 n. 13, which was decided some time before Mr. Kremer took his case to the Appellate Division. There was thus nothing on which Mr. Kremer could have relied since *Mitchell* "clearly foreshadowed" *Sinicropi*. While, as stated, the *Mitchell* majority left the point open, its reasoning, 553 F.2d at 275-76, dictated the *Sinicropi* result. *See Shea* v. *City of St. Paul*, 601 F.2d 345, 351 (8 Cir. 1979). Judge Feinberg made this a principal ground of his *Mitchell* dissent, 553 F.2d at 278, and joined in the per curiam panel opinion in *Sinicropi* which stated "we all believe that the reasoning of that [the *Mitchell*] decision controls this one." Against all this it is of

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[4] This reads:

> The Acts of the legislature of any State, Territory or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

no moment that at the time Mr. Kremer resorted to the Appellate Division there were five district court decisions,[5] two in this circuit, which held that an adverse state judicial decision in a proceeding initiated by the plaintiff did not barr a Title VII action. *See Cates* v. *Trans World Airlines, Inc.*, 561 F.2d 1064, 1072-74 (2 Cir. 1974).

We add that if it were necessary to consider the second and third *Chevron* factors, our conclusion would not be different. Retrospective application of *Sinicropi* would surely further rather than retard the operation of a principle designed to prevent relitigation in the federal courts of issues already determined by the state courts. The third factor likewise is not met. A litigant represented by counsel would have known, even before *Mitchell* and surely thereafter, that going from the state administrative agency to the state courts involved serious risk of the application of res judicata if the state court decision was adverse. No one contends that Mr. Kremer, who was acting pro se, had any knowledge of the district court decisions, or, for that matter, of *Mitchell*.[6] It cannot therefore be said that litigants in Mr.Kremer's position had any justifiable reliance interest which it would be inequitable to violate by retrospective

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[5] *Young* v. *South Side Packing Co.*, 369 F. Supp. 59 (E.D. Wis. 1973); *Benneci* v. *Dep't of Labor*, 388 F. Supp. 1080 (S.D.N.Y. 1975); *Beck* v. *Mather*, 417 F. Supp. 648 (W.D. Va. 1976); *Al-Hamdani* v. *State University of New York*, 438 F. Supp. 299 (W.D.N.Y. 1977); *Nickel* v. *Highway Industries, Inc.*, 441 F. Supp. 477 (W.D. Wis. 1977). Only the latest two of these decisions, in addition to Judge Pierce's opinion in this case, *supra*, 464 F. Supp. 468, were decided after *Mitchell*.

[6] Some point is made that the notice given to Mr. Kremer by the Appeal Board of his right to obtain review in the Appellate Division may have misled him as to the consequences of failure in that court on a Title VII action. The notice was a commendable effort to inform Mr. Kremer of his rights under New York law; the Appeal Board was under no obligation to go further.

application of *Sinicropi*. *See Dasho* v. *Susquehanna Corp.*, 461 F.2d 11, 21 (7 Cir.), *cert. denied*, 408 U.S. 925, 92 S.Ct. 2496, 33 L.Ed.2d 336 (1972) (guiding principle is "to avoid unfairness to parties who may have acted in reliance on the old rule").

The judgment is affirmed.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit held at the United States Court House, in the City of New York, on the fifteenth day of October, one thousand nine hundred and eighty.

Present: HON. J. EDWARD LUMBARD
HON. HENRY J. FRIENDLY
HON. THOMAS J. MESKILL
Circuit Judges.

79-7748
[79-7748]

RUBIN KREMER, PLAINTIFF-APPELLANT

v.

CHEMICAL CONSTRUCTION CORP., DEFENDANT-APPELLEE

Filed: Oct. 15, 1980

A petition for a rehearing having been filed herein by counsel for the appellant Rubin Kremer,

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is denied.

/s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 15th day of October, one thousand nine hundred and eighty

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79-7748
[79-7748]

RUBIN KREMER, PLAINTIFF-APPELLANT

v.

CHEMICAL CONSTRUCTION CORPORATION,
DEFENDANT-APPELLEE

Filed Oct. 15, 1980

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, and a poll of the active judges having been taken, and there being no majority in favor thereof,

UPON CONSIDERATION THEREOF, it is

Ordered that said petition be and it hereby is DENIED.

Judges Oakes and Newman voted in favor of rehearing in banc.

/s/ Wilfred Feinberg
Chief Judge

SUPREME COURT OF THE UNITED STATES

No. 80-6045

RUBIN KREMER, PETITIONER

v.

CHEMICAL CONSTRUCTION CORPORATION

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Second Circuit.

ON CONSIDERATION of the motion for leave to proceed *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question 1 presented by the petition.

June 22, 1981

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FILED
FEB 17 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-6045

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1980

RUBIN KREMER,

Petitioner,

-against-

CHEMICAL CONSTRUCTION CORPORATION,

Respondent.

ON PETITION FOR A WRIT
OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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No. 80-6045

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1980

RUBIN KREMER,

Petitioner,

-against-

CHEMICAL CONSTRUCTION CORPORATION,

Respondent.

ON PETITION FOR A WRIT
OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Chemical Construction Corporation ("Chemico"),[1] respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the decision of the Court of Appeals for the Second Circuit dismissing this case on grounds of res judicata.

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1/ Statement pursuant to Rule 28.1 of this Court: Chemico is a wholly-owned subsidiary of Aerojet-General Corporation, which, in turn, is a wholly-owned subsidiary of The General Tire and Rubber Company.

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OPINIONS AND JUDGMENTS BELOW

In addition to the opinions below which are cited at p. 1 of the Petition for Certiorari, the decision and judgment in Kremer v. State Division of Human Rights, 402 N.Y.S.2d 699 (1st Dep't), also bears upon this case.

STATUTES INVOLVED

In addition to the statutes set forth at page 2 of the Petition for Certiorari, the following additional statute is involved here:

28 U.S.C. § 1738:

> The . . . judicial proceedings of any court of any State . . . shall have the same full faith and credit in every court within the United States. . .as they have by law or usage in the courts of such State. . . .

STATEMENT OF THE CASE

A. The Proceedings Below

On June 2, 1980, the Court of Appeals for the Second Circuit unanimously affirmed the decision of the District Court for the Southern District of New York denying an attempt by petitioner Rubin Kremer ("Kremer") to relitigate in the federal courts, under Title VII of the Civil Rights Act of 1964,[2/] the identical claim of employment discrimination that he had previously asserted unsuccessfully against Chemico in the New York State courts. Both the Second Circuit and the District Court found Kremer's claim to be barred by res judicata upon the authority of Sinicropi v. Nassau County, 601 F.2d 60 (2d Cir.), cert. denied, 444 U.S. 983 (1979) ("Sinicropi"), a decision in turn based upon the earlier ruling of the Court of Appeals in a case dealing with the applicability of res judicata to a claim of discrimination under 42 U.S.C. § 1981, Mitchell v. National Broadcasting Company, 553 F.2d 265 (2d Cir. 1977) ("Mitchell"). The court also rejected Kremer's argument that Sinicropi, which was decided while this case was pending before the District Court, should be applied only "prospectively", so as to preclude application of its ruling to defeat his claim. Kremer's petition for rehearing and his suggestion for rehearing en banc, in which he urged that Sinicropi be overruled, were denied on October 15, 1980.

2/ 42 U.S.C. § 2000e, et seq.

B. Petitioner's Employment

Kremer was employed as an engineer by Chemico, a once-sizable international engineering and construction firm, from 1973 until August 1, 1975. During a period of slackening business he and a number of other employees of Chemico were discharged. When Chemico later rehired certain of these employees, Kremer was not rehired because those few new positions were filled by other former employees with greater seniority and because of his prior inadequate job performance.

C. The Claim Before the EEOC

This action found its way to the Court of Appeals along a now familiar path. On May 6, 1976, Kremer lodged a "Charge of Discrimination" against Chemico with the Equal Employment Opportunity Commission ("EEOC"), claiming that Chemico had discriminated against him because of his Jewish faith and his national origin.[3/] As required by the "deferral" provisions of Title VII,[4/] the EEOC referred Kremer's charge to New York's State Division of Human Rights (the "Division").

3/ Title VII (42 U.S.C. § 2000e-2(a)) prohibits discrimination in employment upon the grounds alleged by Kremer.

4/ The "deferral" provisions of Title VII require that the EEOC must defer action on an employment discrimination claim for a period of 60 days, in order to allow the pertinent State administrative and conciliatory system an opportunity to review, adjudicate and/or conciliate the dispute. If the State agency has not acted within 60 days, or if the complainant is not satisfied with the State administrative decision, he may then request that the EEOC process his claim. 42 U.S.C. § 2000e-5(c).

D. The Proceedings Before the Division

On May 20, 1976 Kremer filed a complaint with the Division alleging that Chemico had discriminated against him because of his Jewish faith, as well as his age.

The Division is a State administrative agency vested with plenary adjudicatory powers to eliminate specified discriminatory practices in employment.[5/] Upon the filing of a complaint, the Division is required to conduct a prompt investigation to determine if there is probable cause to believe that the alleged discrimination occurred.[6/] In the course of such an investigation, a pro se claimant may request the Division to issue subpoenas compelling the attendance of witnesses and the production of documents.[7/] Kremer never requested the Division to do so. If the Division finds "probable cause" to believe that the claimant's allegations have merit or are not frivolous, it must hold a public hearing on the discrimination charges.[8/]

5/ N.Y. Exec. L. § 295 (McKinney 1972 and Supp. 1976); Gaynor v. Rockefeller, 15 N.Y.2d 120, 132-133, 204 N.E.2d 627 (1965).

6/ N.Y. Exec. L. § 297(2).

7/ The Division's regulations provide for the issuance of subpoenas and subpoenas duces tecum "at the instance of any party who appears without attorney. . . ." Such subpoenas may be issued "at any stage of any investigation or proceeding pending before the Division. . . ." Rules of Practice and Procedure of the Division of Human Rights, 9 N.Y.C.R.R. 465.10 (1975); see Mitchell, supra, 553 F.2d at 271 n. 7.

8/ N.Y. Exec. L. § 294(4).

If, after the hearing, the Division finds that the employer has engaged in discriminatory conduct, the Division has full power to enforce the law. It can issue cease and desist orders, order that the employee be reinstated, and require the employer to pay back wages and damages.[9/]

If, however, the Division finds no probable cause to believe that the alleged discrimination occurred, it has authority to dismiss the complaint.[10/]

The Division conducted a multi-stage investigation of Kremer's allegations that afforded him full opportunity to state his case. On August 24, 1976 (by which time the 60-day "deferral" period had expired and Kremer, therefore, enjoyed the right to return to the EEOC and the District Court to press his charges,)[11/] Kremer met with a Division Field Representative, who reviewed with him all of the documents Chemico had submitted to the Division in response to his claim.

9/ N.Y. Exec. L. § 297(4).

10/ N.Y. Exec. L. § 297(2).

11/ The 60-day "deferral" period during which Kremer was required to seek State administrative relief expired on July 19, 1976.

On November 9, 1976 Kremer met with another official of the Division and stated his case to her. Finally, in March 1977, Kremer met with and stated his case once again to the Division's Regional Director.

On April 28, 1977 the Division issued its Determination and Order After Investigation (the "Determination and Order"), finding that there was "no probable cause to believe that [Chemico] engaged in or was engaged in the unlawful discriminatory practice complained of". The Division, therefore, dismissed the complaint.

E. The Proceedings Before the Appeal Board

On May 10, 1977 Kremer appealed the Division's Determination and Order to the State Human Rights Appeal Board (the "Appeal Board"), pursuant to the provisions of N.Y. Exec. L. § 297-a. In addition to arguing in his appeal that Chemico had discriminated against him, Kremer also raised and argued his claim that the Division had not given him an adequate and a procedurally fair hearing.

The Appeal Board is an adjudicatory authority within New York's Executive Department and is independent of

the Division.[12/] Its decisions are final and binding upon the Division, except as they may be modified by New York's appellate courts.[13/]

On September 16, 1977 Kremer, after having submitted his arguments in writing, appeared before the Appeal Board and orally argued his case. On November 25, 1977, after reviewing the record, the Appeal Board affirmed the Determination and Order of the Division.

12/ The scope of the Appeal Board's review is limited to determining whether the order of the Division is:

a. in conformity with the constitution and the laws of the state and the United States;

b. within the division's statutory jurisdiction or authority;

c. made in accordance with procedures required by law or established by appropriate rules or regulations of the division;

d. supported by substantial evidence on the whole record, or

e. not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

N.Y. Exec. L. § 297-a(7).

13/ Id.

F. The Proceedings Before the Appellate Division

Petitioner then embarked upon a course of action which, for res judicata purposes, was of crucial, and controlling, significance. He decided to step outside the EEOC and State administrative framework of Title VII to which his claim had been "deferred", by appealing the order of the Appeal Board, on December 6, 1977, to a court, the Appellate Division of the New York Supreme Court[14/] (the "Appellate Division"). His appeal was lodged pursuant to both Section 298 of the Human Rights Law[15/] and New York

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14/ Mr. Kremer filed his appeal with the Appellate Division eight months after the Second Circuit's decision in Mitchell (see p. 1 , supra), and more than sixteen months after the expiration of the Title VII "deferral" period.

15/ The scope of review of the Appeal Board's order by the Appellate Division under § 298 of the Human Rights Law (N.Y. Exec. L. § 298) is as follows:

> The findings of fact on which such order is based shall be conclusive if supported by sufficient evidence on the record considered as a whole.

C.P.L.R. Article 78.[16/]

Under Section 298 of the Human Rights Law (N.Y. Exec. L. § 298), the Appellate Division has authority to enforce, modify or set aside the order appealed from. It may also remit a case to the Division for further proceedings if it finds that the investigation was procedurally inadequate and that specified evidence should have been adduced, but was not.

16/ The scope of review under C.P.L.R. § 7803 is as follows:

> The only questions that may be raised in a proceeding under this article are:
>
> 1. whether the body or officer failed to perform a duty enjoined upon it by law; or
>
> 2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or
>
> 3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or
>
> 4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

On this appeal, Kremer argued that Chemico had in fact discriminated against him as alleged and that the orders of the Appeal Board and the Division should be reversed. He also raised and argued his claim that the procedures before the Division had not given him an adequate and procedurally fair hearing and that specified evidence was not adduced.

The issues were briefed before the Appellate Division by both parties, and the full certified record of the administrative proceedings before the Division and the Appeal Board was submitted to the Appellate Division by the Division's General Counsel.[17/] On February 27, 1978, after receipt of all of the parties' submissions and of the certified record of the proceedings below, the Court unanimously ordered that "the determination of the respondent, the State Human Rights Appeal Board be, and the same hereby is, confirmed. . . ." [18/]

Kremer did not seek to appeal the order of the Appellate Division to the New York Court of Appeals, although he had that right.[19/]

17/ Mr. Kremer's unsubstantiated assertion (Petition for Certiorari, p. 13), that the certified record of the Division's proceedings was not before the court is simply not supported by the record.

18/ Kremer v. State Division of Human Rights, 402 N.Y.S.2d 699 (1st Dep't 1978).

19/ N.Y. Exec. L. § 298.

Under New York law, the order of the Appellate Division confirming dismissal of Kremer's claim has the status of a judgment, to which New York's courts give full res judicata effect.[20/]

G. Final Proceedings Before the EEOC

On December 4, 1977 Kremer returned to the EEOC for a final determination of his claim.[21/] On May 11, 1978 the EEOC denied his claim, finding that "there is not reasonable cause to believe that the charge is true". Dissatisfied with the EEOC's determination, he requested reconsideration in a letter dated June 15, 1978. By a letter dated June 27, 1978, the EEOC denied his request.

Kremer then commenced this Title VII action in the District Court. His complaint consisted of a one-page cover sheet to which was annexed virtually the entire record of the State administrative and judicial proceedings, and he has never disputed, that for res judicata purposes, his "cause of action" in the State proceedings was identical to that later asserted in the District Court.

20/ Reilly v. Reid, 58 A.D.2d 926, 397 N.Y.S.2d 429, 430, aff'd., 45 N.Y.2d 24, 379 N.E.2d 172 (1978).

21/ Again, Kremer had been free to return to the EEOC and press his claim before it and the District Court (regardless of the Division's actions) at any time after July 19, 1976 and long before the Division rendered its decision. This he did not do.

SUMMARY OF ARGUMENT

The writ should be denied for four reasons:

1. Contrary to petitioner's assertion, there is no conflict between the decision of the Second Circuit here and those of other Courts of Appeal.

2. 28 U.S.C. § 1738 requires federal courts to give full faith and credit to the judgments of State courts; the provisions of Title VII and its legislative history evidence no intention to override this statute or to repeal it by implication.

3. To the extent that the courts have found a requirement for de novo hearings of Title VII claims by the District Courts, they have done so only to prevent the District Courts from according preclusive effect to findings made in non-adversarial EEOC proceedings or in private arbitration proceedings; a judgment of a State court, on the other hand, is entitled to be accorded full res judicata effect.

4. For reasons fully addressed by the Court of Appeals, petitioner's "retroactivity" argument misconstrues the clear rule enunciated by this Court.

ARGUMENT

A. Introductory Remarks

Petitioner argues that granting of certiorari would be warranted because (1) the decision of the Court of Appeals in this case, and that in Sinicropi, upon which it relied, are in conflict with decisions of the Third and Eighth Circuits; and (2) the refusal of the Second Circuit to carve out a special Title VII exception to res judicata ignores what petitioner asserts to be a strong congressional policy requiring de novo hearings in the District Courts of all Title VII claims. Neither argument has any merit. In a subsidiary argument, confined to a single footnote, petitioner also urges that the Court of Appeals erred in declining to refuse to limit the "retrospective" effect of its decision in Sinicropi.

The three-judge panel of the Court of Appeals which heard Kremer's appeal properly declined his invitation to overrule an earlier panel's decision in Sinicropi and, therefore, did not discuss in its opinion the merits of the Sinicropi holding. For that reason and because Mr. Kremer challenges Sinicropi here, we discuss the rationale of that decision. The Court of Appeals, however, devoted a careful and lengthy discussion to Mr. Kremer's "retroactivity" argument, and, having nothing to add to that analysis, we respectfully refer this Court to that discussion of this point. See, 623 F.2d at 788-91.

B. There Is No Conflict with Decisions in Other Circuits

Urging that the writ be granted, Kremer asserts that the Second Circuit's decision here "conflicts with the decisions of two other circuit courts, and at least eight district court decisions". Petition for Certiorari, p. 7.

First, no asserted "conflict" between a decision of a Court of Appeals and decisions of District Courts, whether in the same or other circuits, provides a reason for granting the writ of certiorari.

Second, the "conflict" between the decisions of the Second Circuit here and in Sinicropi and those of other circuits does not in fact exist. Petitioner cites two such supposedly "conflicting" decisions: Smouse v. General Electric Co., 626 F.2d 333 (3rd Cir. 1980), and Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079 (8th Cir.), cert. denied, ____U.S.____, 100 S.Ct. 2942 (1980). Both of these asserted "conflicts" are illusory.

In each of these other Title VII cases, it was the employer, rather than the employee, that brought an appeal from a State's administrative agency to that State's appellate courts. While both courts "disagreed" with

Sinicropi, both also expressly distinguished it upon this very ground.[22/]

This distinction is critical for res judicata purposes, as well as for safeguarding the integrity of Title VII. The deferral provisions of Title VII require an employee to pursue available state administrative remedies for 60 days before proceeding under Title VII before the EEOC or in the District Courts. It would indeed be anomalous and unfair to permit an employer to obtain a reversal in a State court of a state administrative finding of discrimination and then to assert that State court judgment as res judicata to deny the employee his Title VII remedies in federal court.[23/]

22/ See, Gunther, 612 F.2d at 1084 ("Mitchell and Sinicropi . . . are distinguishable and not controlling in our case . . .") and Smouse, 626 F.2d at 336 ("Here defendants sought state judicial review and, consequently, Sinicropi is distinguishable on that ground.")

In Smouse, the state proceeding involved a claim of discrimination brought by employees other than the plaintiff which the state administrative agency treated as a class action. Although deciding the case on other grounds, the Third Circuit noted that "it is unclear from the record how . . . the class action was certified by the [state agency] in this case or what type notice the plaintiff received" or "whether the procedures employed were adequate to bind the plaintiff by the class determination in the state proceedings".

23/ See, Gunther, supra, 612 F.2d at 1084, quoting Mitchell, supra, 555 F.2d at 275 n. 13, with approval.

The deferral provisions of Title VII, however, neither require an employee to pursue available state judicial remedies nor even to press his claim before state administrative authorities for longer than 60 days. This distinction is important and was recognized as such by both the Third and Eighth Circuits.

C. 28 U.S.C. § 1738 Is Fully Applicable Here

Petitioner states that "Res Judicata is a flexible, equitable doctrine". Petition for Certiorari, p. 15. No doubt it is. As such, it is difficult to conclude either that the equities are violated when an employee is denied the opportunity to relitigate in a federal forum a claim which he voluntarily and unsuccessfully brought before a State court or that an employer, burdened with defending that claim in the State court, should be denied the benefits - repose and freedom from defending claims already found to be meritless - that the rule of res judicata is designed to confer. Montana v. United States, 440 U.S. 147, 153 (1979).

For a federal court, however, faced with a plaintiff's attempt to relitigate a claim upon which he has lost in a prior State judicial proceeding, res judicata is no "mere" "flexible, equitable doctrine". This Court considered this question earlier this Term in the context of

a civil rights action under 42 U.S.C. § 1983:

> [T]hough the federal courts may look to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts, Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so:
>
> > The . . . judicial proceedings of any court of any State . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State. . . .
>
> 28 U.S.C. § 1738 (1976). (Emphasis added.)

Allen v. McCurry, ____U.S.____, 101 S.Ct. 411, 415-16 (1980) (footnote omitted; emphasis added).

In his single reference to 28 U.S.C. § 1738, Petition for Certiorari, p. 10, n.*, petitioner argues that Title VII "overrides the more general statutory requirement" of this long-standing provision. Such an implied repeal of 28 U.S.C. § 1738, Kremer maintains, is to be found in the supposedly overweaning congressional policy requiring de novo determinations of Title VII claims. Nowhere, however, does the language of Title VII either require this result or even hint at the existence of such a policy or any intent to override the express mandate of

28 U.S.C. § 1738. The Court dealt with an analogous claim in Allen v. McCurry, supra, and rejected it:

> [T]he legislative history of § 1983 does not in any clear way suggest that Congress intended to repeal or restrict the traditional doctrines of preclusion. The main goal of the Act was to override the corrupting influence of the Ku Klux Klan and its sympathizers on the governments and law enforcement agencies of the Southern States . . . and of course the debates show that one strong motive behind its enactment was grave congressional concern that the state courts had been deficient in protecting federal rights. . . . But in the context of the legislative history as a whole, this congressional concern lends only the most equivocal support to any argument that, in cases where the state courts have recognized the constitutional claims asserted and provided fair procedures for determining them, Congress intended to override § 1738 or the common-law rules of collateral estoppel and res judicata. Since repeals by implication are disfavored, Radzanower v. Touche Ross & Co., 426 U.S. 148, 154, 96 S.Ct. 1989, 1993, 48 L.Ed.2d 540, much clearer support than this would be required to hold that § 1738 and the traditional rules of preclusion are not applicable to § 1983 suits.

____U.S.____, 101 S.Ct. at 417 (emphasis added; citations omitted).

The same conclusion follows in the case of Title VII, enacted by a Congress having far greater reason to concern itself with rules of preclusion than did the post-bellum Congress that enacted § 1983, yet giving no indication at all of any intent to override § 1738.

Unable to point to any express provisions of Title VII or any portions of its legislative history requiring de novo determinations in federal courts, petitioner cites three decisions of this Court as mandating that policy, chief among those Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).[24/]

That decision does not deal at all with the central issue here, whether a State court judgment is res judicata of a later federal action. Rather, the Court limited its inquiry, and the scope of its holding, in the opening paragraph of its opinion:

> This case concerns the proper relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements in the resolution and enforcement of an individual's rights to equal employment opportunities under Title VII. . . . Specifically, we must decide under what circumstances, if any, an employee's statutory right to a trial de novo under Title VII may be foreclosed by prior submission of his claim to final arbitration under the nondiscrimination clause of a collective-bargaining agreement.

415 U.S. at 38 (emphasis added).

24/ Kremer also relies upon Chandler v. Roudebush, 425 U.S. 840 (1976) and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Both of these decisions are concerned with the effect of a prior administrative proceeding upon a later Title VII action and are, therefore, inapposite.

The Court did not deal with either the Full Faith and Credit provision of 28 U.S.C. § 1738, which is inapplicable to an arbitral decision, or with the question whether any policy of Title VII favors a de novo hearing with such force as to overcome the mandate of 28 U.S.C. § 1738. Rather, the Court held only that the policies of Title VII were strong enough to outweigh the "federal policy favoring arbitration of labor disputes. . . ." 415 U.S. at 45-46, and 46 n. 6.25/

25/ The Court also recognized the substantial disparity between the contractually-circumscribed arbitration remedy and the policy of Title VII favoring a full hearing of the discrimination claim:

> As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement . . . in accordance with the "industrial common law of the shop" and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws . . . . Thus, the arbitrator has authority to resolve only questions of contractual rights, and this authority remains regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII.

415 U.S. at 53-54 (citation omitted).

In addition, the Court based its decision on the ground that it would be manifestly unfair to hold that an employee could "waive" his Title VII rights via a collective bargaining agreement, where such a decision would be made by union-management negotiations, not by a personal, knowing decision. 415 U.S. at 51.

D. The Actual Scope of the Requirement Under Title VII for a de novo Hearing

Respondent does not deny that there is a right to a de novo hearing of a Title VII claim under certain circumstances, although no section of Title VII specifically requires a de novo hearing in a federal court. See, 42 U.S.C. § 2000e-5. There is also no grant of exclusive jurisdiction to the federal courts over Title VII actions.[26/] The de novo requirement is a judicially-created gloss on Title VII, based upon the statute itself, its legislative history and the holdings of the federal courts which have construed it.

This Court in Allen v. McCurry, supra, and the Second Circuit in Mitchell, supra, upon which the latter based its decision in Sinicropi, supra, have found no "civil rights" exception to the normal applicability of res judicata in actions under 42 U.S.C. §§ 1983 and 1981, respectively.[27/] Petitioner attempts to distinguish Mitchell, supra, by arguing that because in Title VII Congress "created a complex and carefully thought out structure for the resolution of employment discrimination claims. . . [t]he essential framework of the statutes - Section 1981 and

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26/ See, Bennun v. Board of Governors of Rutgers, 413 F.Supp. 1274 (D. N.J. 1976).

27/ In an earlier decision, the Court of Appeals exhaustively examined the cases carving out a "civil rights" exception to res judicata and found that exception to be a narrow one indeed. Winters v. Lavine, 574 F.2d 46 (2d Cir. 1978).

Title VII - are simply different". Petition for Certiorari, p. 10. The "complexity" of Title VII, however, and the limited right to a de novo hearing both stem from the relationship between the federal courts and the EEOC.

Of primary concern to Congress were the weight and effect an EEOC determination would have in a subsequent Title VII federal court action. Chandler, supra, 425 U.S. at 843-58. The congressional purpose underlying the policy favoring a de novo hearing was the desire to ensure that the District Court would not merely review the decision of the EEOC, but would ascertain the facts itself.[28/]

This congressional policy favoring a de novo hearing was thus intended to free the District Courts to make independent factual findings at variance from any made by the EEOC, not to grant federal courts license to review the judgments of State courts unfettered by the requirements of 28 U.S.C. § 1738.

None of the decisions cited by petitioner in support of his position that Title VII always requires a de novo federal court hearing, Chandler, supra, McDonnell Douglas, supra, and Weahkee v. Perry, 587 F.2d 1256 (D.C. Cir. 1978),[29/] supports

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28/ See, Interpretative Memorandum submitted by Senators Clark and Case, the floor-managers of the proposed legislation, 110 CONG. REC. 7213-14 (1964).

29/ Except for Gardner-Denver, which is discussed at pages 18 and 19 of this Brief.

that position. All these decisions, rather, deal with Congress's concern over the weight to be given an EEOC determination in a subsequent Title VII federal court proceeding. Those cases hold that the District Court cannot merely review the EEOC's determination in an appellate capacity, but is required to ascertain the facts itself. It scarcely need be noted that such a holding is not a holding that a prior State court judgment is not res judicata.

The courts have based their holdings that Title VII requires a judicial de novo hearing, rather than a mere review of the EEOC determination, largely on the statutory relationship between the EEOC and the federal courts. The nature of the EEOC proceedings is non-adversarial. The EEOC, moreover, has no authority to enforce the anti-discrimination provisions of Title VII, either by issuing cease and desist orders, requiring payment of back pay or requiring reinstatement. See, 42 U.S.C. § 2000e-5. All of these powers are vested exclusively in the federal court. That fact has led the courts to hold the federal District Court, not the EEOC, responsible for holding the de novo hearing. Chandler, supra, 425 U.S. at 848, n. 8, et seq.

The Ninth Circuit, in Bowers v. Campbell, 505 F.2d 1155 (9th Cir. 1974), has specifically noted that those decisions upholding a right to a de novo hearing were "made

in light of the nonadversary nature of many EEOC proceedings". 505 F.2d at 1160, citing McDonnell Douglas, supra. As this Court said in Gardner-Denver:

> . . . Title VII does not provide the Commission with direct powers of enforcement. The Commission cannot adjudicate claims or impose administrative sanctions. Rather, final responsibility for enforcement of Title VII is vested with federal courts. The Act authorizes courts to issue injunctive relief and to order such affirmative action as may be appropriate to remedy the effects of unlawful employment practices. . . . Courts retain these broad remedial powers despite a Commission finding of no reasonable cause to believe that the Act has been violated. . . . Taken together, these provisions make plain that federal courts have been assigned plenary powers to secure compliance with Title VII.

415 U.S. at 44-45; accord, Chandler, supra, 425 U.S. at 852-53.

The considerations which have led the courts to require that the District Court (as opposed to the EEOC) conduct a de novo hearing do not apply in this case.

The New York Division has plenary powers to conduct full evidenciary hearings, and to enforce the law with remedial orders. In addition, the Appellate Division is empowered to enforce any order of the Appeal Board. Thus, the state administrative and judicial machinery has "plenary powers" to hold adequate hearings and to secure

compliance with the anti-discrimination laws. C.f., Gardner-Denver, supra, 415 U.S. at 45.

Gardner-Denver, Chandler and Bowers, then, read together, teach that the de novo requirement flows from the nature of the EEOC, and that when a claim is heard by an appropriate forum, with appropriate powers, prior to being brought to the federal court, the decision of the prior forum will be given such effect as the nature of that forum warrants. A decision of a State court warrants res judicata effect.

There is, therefore, no policy reason for petitioner to have a second hearing before a federal court.

E. That the New York Court Confirmed Dismissal under a "Restrictive" Standard of Review Does Not Strip Its Judgment of Res Judicata Effect

Lastly, petitioner argues that because the New York appellate court did not conduct a de novo inquiry into his claim but rather reviewed the determination below under a "restrictive" standard, its judgment confirming dismissal should not be accorded res judicata effect. Here he ignores three points.

First: The standard of review of any appellate court, State or federal, is necessarily different from that applied by the trier of fact; the restrictive standard of appellate review, however, does not deprive appellate judgments of res judicata effect.

Second: The standard of review applied by the State court here was that of N.Y. Exec. L. §298,[30] a standard in all material respects identical to that under § 706 of the Federal Administrative Procedure Act.[31] It cannot seriously be suggested that a decision of a federal court reviewing an administrative determination is subject to collateral attack.[32] Yet that result would follow from Kremer's analysis.

Third: Under New York law, the decision of the court in an Article 78 proceeding such as that brought by Kremer terminates in a "judgment . . . determining the rights of the parties".[33]

> We are not dealing here with an administrative proceeding. That proceeding has ended and has been merged in a decree of a court . . ..

International Union of Mine, Mill and Smelter Workers v. Eagle-Picher Mining & Smelting Co., 325 U.S. 335, 339 (1945) (emphasis added).

30/ See p. 7 of this Brief.

31/ 5 U.S.C. § 706.

32/ When an administrative agency exercises power of a quasi-judicial or adjudicatory nature and its order has been affirmed by the final judgment of a reviewing court, the rights and liabilities necessarily determined by the judgment of affirmance become res judicata.

In re Federal Water & Gas Corp., 188 F.2d 100, 104 (3rd Cir.), cert. denied, 341 U.S. 953 (1951); accord, FTC v. Rubberoid Co., 343 U.S. 470, 476 (1952); Springfield Television Corp. v. F.C.C., 609 F.2d 1014, 1019 (1st Cir. 1979); Herman v. Gillilland, 218 F.2d 852, 853 (D.C. Cir. 1955).

33/ N.Y. C.P.L.R. § 411.

CONCLUSION

Petitioner Kremer has advanced no reasons sufficient to warrant granting of the writ of certiorari, and, accordingly, his petition should be denied.

February 11, 1981

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No. 80-6045

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1980

RUBIN KREMER,

Petitioner,

-against-

CHEMICAL CONSTRUCTION CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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February 26, 1981

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PRELIMINARY STATEMENT

The Brief in Opposition attempts to treat this case as if petitioner were seeking "license" for the Federal courts "to review the judgments of state courts" (Brief at 21). Petitioner seeks no such thing. The only state court "judgment" here was a ruling that the state administrative decision dismissing petitioner's state discrimination complaint was not arbitrary, capricious or an abuse of discretion. This Title VII action is not a collateral attack on that judgment. Rather, it is an assertion of an independent Federal statutory right--a right that Congress intended to include a trial de novo in Federal court.

In trying to support its mistaken "collateral attack" theory, respondent argues that this Court did not really mean what it said when it repeatedly and unanimously recognized the right to a de novo Federal trial. Indeed, the Brief in Opposition only underlines the importance of the questions presented here and the need for clarification of the scope of that right.

ARGUMENT

1. This is an action to enforce a Federal statutory right which encompasses the right to a de novo Federal court hearing; it is not a collateral attack on a state judgment. All that petitioner is seeking is to have a court hear the merits of his discrimination claim for the first time. Mr. Kremer is not relitigating the one issue that was actually decided by the New York state courts--whether the NYHRD acted arbitrarily or capriciously. This is not an attempt to retry issues in Federal court by means of a collateral attack on the judgment of a state court, rendered after a full adversarial judicial hearing on the identical issues, as was the case in Allen v. McCurry, ____ U.S. ____, 66 L. Ed.2d 308 (1980), cited by respondent.* Thus, the mechanical application of the full faith and credit provisions of 28 U.S.C. § 1738, as advocated by respondent, is inappropriate here.

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* In addition, the claim raised in Allen was that the plaintiff, who had been convicted of assault and possession of heroin in state court, had been the victim of a search violating the Fourth Amendment. There was no claim of unlawful discrimination. Finally, as discussed below, Allen was an action brought under 42 U.S.C. § 1983, to which the Title VII de novo hearing requirement does not apply.

More importantly, whatever the applicability of § 1738 in other situations where there has been state appellate review of administrative determinations, it is overriden here by the intent of Congress in enacting Title VII. Respondent asserts that there is no "exception to the normal applicability of res judicata in actions under 42 U.S.C. §§ 1983 and 1981" (Brief at 20). Even if true, this assertion is irrelevant in a Title VII action.*

Respondent concedes, in effect, that a Congressional "intent" to mandate de novo Federal hearings in Title VII cases would override § 1738 (Brief at 16-17). But respondent goes on to claim that when this Court found that Congress had precisely that "intent", see Chandler v. Roudebush, 425 U.S. 840 (1976); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), its holdings were distinguishable. Respondent is wrong in that contention, as two courts of appeals concluded when they refused to follow Sinicropi and created a circuit conflict.**

Moreover, in relying on the inapposite Allen case, respondent ignores the directly relevant decision last term in New York Gaslight, Club Inc. v. Carey, ____ U.S. ____, 64 L. Ed.2d 723 (1980). In that case, the plaintiff, like Mr. Kremer, filed a discrimination charge

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* For this reason, also, respondent's heavy reliance on Allen v. McCurry, supra, a § 1983 collateral estoppel case, is misplaced.

** See Smouse v. General Electric Co., 626 F.2d 333 (3d Cir. 1980); Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079 (8th Cir.), cert. denied, ____ U.S. ____, 100 S. Ct. 2942 (1980), discussed in the Petition for Certiorari at 8, 10-11, 17.

with the EEOC, which referred it to NYHRD. NYHRD investigated and, unlike this case, held a public hearing and found that there had been discrimination; it ordered back pay and an employment offer. On defendant's appeal, both the Appeals Board and the Appellate Division approved NYHRD's determination. However, while the state court appeal was still pending, the plaintiff went to Federal court on the same charges.

This Court ultimately held that the Federal court plaintiff could recover attorneys' fees incurred in state administrative proceedings--a question described as "significant to the enforcement of the antidiscrimination provisions of Title VII", id. at 732.

In reaching that holding, this Court analyzed the structure of Title VII specifically in light of the same New York procedures that are at issue here. In that context, it cited extensively from the Alexander decision (which respondent would not follow) and noted, among other points, that:

> "Title VII establishes a comprehensive enforcement scheme in which state agencies are given 'a limited opportunity to resolve problems of employment discrimination and thereby to make unnecessary, resort to federal relief by victims of the discrimination.' Oscar Mayer & Co. v. Evans, 441 U.S. 750, 755 (1979)." 64 L. Ed.2d at 734.

As demonstrated in the Petition for Certiorari at 17-18, the inevitable result of the decision below will be to "undermine Congress' intent to encourage full use of state remedies", since "almost all Title VII complainants would abandon state proceedings", id. at 736 n.6, without seeking judicial review, in order to preserve their Federal rights.

Even more significantly, this Court considered "the propriety of EEOC's issuance of the right to sue letter", id. at 735 n.5--an essential prerequisite to bringing a Federal court action. That issue was raised by the district court's statement that it was "'very doubtful'" whether the EEOC should have done so "while state proceedings were pending", id. at 731. This Court "disagree[d] with the District Court":

> "As we read the statute, the Commission was required to issue the letter after 180 days, regardless of the posture of any state proceedings." Id. at 735 n.5.

It follows that a Title VII action may be brought "regardless of the posture of any state proceedings". The Federal court then has power to afford relief, otherwise available under Title VII, that has not been granted by the state. In this case, where the "state proceedings" gave no relief, the Federal court has power to grant petitioner the full panoply of Title VII remedies; it cannot dismiss his case without reaching the merits of his claim.

2. The right to a trial de novo exists regardless of the powers of a state agency or the pursuit of sharply limited state court appeals. Respondent asserts that the combination of a state administrative determination (if the state agency has "plenary" powers) and appellate review of that determination under an "arbitrary and capricious" standard is tantamount to the Federal trial de novo mandated by Congress. Lacking in the cases or legislative history, this assertion is, moreover, simply illogical.

First, even respondent admits that NYHRD's so-called "plenary" powers are exercisable only when there has been a hearing.* But in this case, there was no hearing. Thus, the supposed availability of any "plenary" powers of the NYHRD is irrelevant here.**

In any event, petitioner did not lose his right to a de novo hearing when--acting pro se and indisputably having met all of the complex procedural prerequisites to

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* Despite respondent's characterization, the fact is that NYHRD's powers are not "plenary" as compared to those of a Federal court acting to enforce Title VII. Thus, as amicus below, the EEOC described the New York procedures as "precisely those which Congress rejected for enforcement of Title VII and which are inadequate to replace the federal scheme", Pet. A. 58. And the EEOC characterized the treatment accorded Mr. Kremer by NYHRD as "a perfunctory ex parte administrative investigation", ibid. These descriptions of NYHRD's procedures by the EEOC--the expert in the field--hardly comport with respondent's portrayals.

** Respondent criticizes Mr. Kremer for failing to use NYHRD regulations that supposedly allowed issuance of subpoenas. There is no suggestion, however, that Mr. Kremer was ever informed of this right. In fact, both NYHRD and the Appeals Board ignored the lists of witnesses that Mr. Kremer repeatedly submitted to them.

Furthermore, the relevant provision of the NYHRD regulations is not mandatory. It provides only that subpoenas "may be issued" at the request of a party. More importantly, "[i]ssuance of a subpoena duces tecum at the instance of a party who appears without attorney"--as petitioner did--"shall depend upon a showing of necessity". 9 N.Y.C.R.R. § 465.12(c) (1977); see also 9 N.Y.C.R.R. § 465.10(a) (1975). Respondent's suggestion that this subpoena power was of any use to Mr. Kremer is thus misleading.

Respondent's further suggestion that Mr. Kremer is to be faulted because he failed to return to the EEOC while awaiting the NYHRD decision is both irrelevant and wrong. In fact, petitioner did attempt to renew his EEOC complaint on March 4, 1977, almost two months before NYHRD rendered its decision, and he renewed it again two days before he filed his state court appeal. See Kremer v. Chemical Construction Corp., 464 F. Supp. 468, 470 (S.D.N.Y. 1978) (Pierce, J.), Pet. A. 30, A. 31.

a Title VII action--he sought to protect his state-created rights by appealing to state court. The Appellate Division had no power to conduct any trial; its review was limited by the "arbitrary and capricious" standard. Thus, the state courts could not and did nct consider the merits of Mr. Kremer's discrimination claim, as Congress has mandated the Federal courts to do. See Petition for Certiorari at 13-17.

Finally, if respondent's reasoning were correct, it would lead to anomalous and patently inequitable results. For example, even under respondent's theory, a plaintiff who receives a full hearing before the NYHRD is free to return to the EEOC and, thereafter, to initiate a Federal court action on the same issue determined in the state hearing, so long as there was no appeal to state court. Indeed, this is true even if the NYHRD finds discrimination and exercises its "plenary" powers. Cf. New York Gaslight Club, Inc. v. Carey, supra. Thus, such a plaintiff might have a full hearing at the state agency level and a trial in Federal court. Yet respondent argues that if a discrimination claim is dismissed summarily by NYHRD and the Appellate Division considers only whether that determination was "arbitrary or capricious", the plaintiff may be denied not only a hearing at the agency level, but also any judicial hearing on the merits of his or her claim. Such a result is inconsistent with the structure and intent of Title VII as it has been repeatedly interpreted by this Court. See, e.g., cases cited at page 3 above.

Thus, New York Gaslight Club, Inc. v. Carey, supra, emphasized once again "the ultimate authority of federal courts to enforce Title VII", 64 L. Ed.2d at 736. It interpreted Title VII to mean that:

> "For example, if state proceedings result in an injunction in favor of the complainant, but no award for backpay because state law does not authorize it, the complainant may proceed in federal court to 'supplement' the state remedy." Id. at 736-37.

Here, even assuming that some Title VII rights could be lost by a state court appeal, state law does not authcrize a trial de novo. Accordingly, Mr. Kremer has not received "satisfactory relief . . . in state forums", id. at 736, and is entitled to obtain such relief--a trial de novo--in Federal court.

CONCLUSION

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

February 26, 1981

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No. 80-6045

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RUBIN KREMER, PETITIONER

v.

CHEMICAL CONSTRUCTION CORP.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The United States will discuss the following question:

Whether a state administrative agency's adjudication of a state discrimination claim that has been affirmed by a state appellate court has any preclusive effect on federal court adjudication of a Title VII claim.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Petitioner, a Jew who immigrated to this country from Poland in 1970, was employed as an engineer by respondent Chemical Construction Corporation (Pet. 2). He claims that he was discharged and was not rehired by respondent because of his religion and national origin (Pet. App. A.1, A.12).

Proceedings on the State Claim

Petitioner filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), asserting that respondent had discriminated against him in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a). As required by Title VII and its regulations,[1/] the EEOC referred the charge to the appropriate state administrative agency, the New York State Division of Human Rights ("NYHRD"), to determine whether respondent's actions violated the state anti-

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1/ 42 U.S.C. 2000e-5(c); 29 C.F.R. 1601.12(b)(1)(iii),(iv). See Love v. Pullman Co., 404 U.S. 522 (1972).

discrimination law, N.Y. Exec. Law §296 (McKinney Supp. 1972-1980) (Pet. App. A.1, A.12).

The NYHRD determined, after an investigation, that there was no probable cause to believe that respondent had violated the New York statute (Pet. App. A.2; id. at A.12-A.13 & n.1). Petitioner pursued an administrative appeal to the State Human Rights Appeal Board; the Appeal Board concluded, pursuant to N.Y. Exec. Law §297-a(7)(e) (McKinney 1972), that the NYHRD's determination was "not arbitrary, capricious or an abuse of discretion" (Pet. App. A.13). Attached to the order of the Appeal Board was a notice stating that petitioner could obtain judicial review by filing a petition in the appropriate Appellate Division of the New York Supreme Court (Pet. App. A.2).

Petitioner, who appeared pro se throughout the state proceedings, requested the Appellate Division, First Department, to set aside the order of the Appeal Board pursuant to N.Y. Exec. Law §298 (McKinney Supp. 1972-1980) and N.Y. C.P.L.R. art. 78 (McKinney 1963) (Pet. App. A.2, A.13). After a review of the administrative record, the Appellate Division unanimously "confirmed" the order of the Appeal Board (Pet. App. A.2, A.13).

Proceedings on the Federal Claim

Petitioner renewed his claim before the EEOC. Based upon "the [NYHRD's] findings, the complaint, and the record" (Pet. App. A.31), the District Director of the EEOC determined that there was no reasonable cause to believe that Title VII had been violated (Pet. App. A.2, A.13-A.14). The District Director issued petitioner a right-to-sue letter, informing petitioner that he was entitled to bring his Title VII claim in federal court (Pet. App. A.14).

Petitioner then filed this action in the United States District Court for the Southern District of New York, asserting a claim under Title VII (Pet. App. A.3, A.14). Respondent moved to dismiss the complaint under Fed. R. Civ. P. 12(b) or,

alternatively, for summary judgment under Fed. R. Civ. P. 56 on the ground of res judicata. The district court denied the motion (Pet. App. A.28-A.39; 464 F. Supp. 468).

Thereafter, in an unrelated case, the United States Court of Appeals for the Second Circuit held that the doctrine of res judicata bars adjudication of a Title VII claim in federal court following adjudication of a state discrimination claim by a state administrative agency and review of the administrative record by a state appellate court. Sinicropi v. Nassau County, 601 F.2d 60, 62 (2d Cir.), cert. denied, 444 U.S. 983 (1979). The court of appeals' brief, per curiam decision in Sinicropi relied solely upon Mitchell v. National Broadcasting Co., 553 F.2d 265 (2d Cir. 1977), a case arising under 42 U.S.C. 1981. The court in Mitchell had reasoned that a state agency proceeding affords an "adjudicatory process comparable" to federal court adjudication (553 F.2d at 270-271), and that under 28 U.S.C. 1738 the affirmance of a state agency's determination by a state appellate court creates a res judicata bar to a federal court action (id. at 271-277).

Following the decision in Sinicropi, respondent renewed its motion to dismiss petitioner's complaint. This time the district court granted respondent's motion (Pet. App. A.12-A.27; 477 F. Supp. 587), observing that "Sinicropi permits no choice but to dismiss plaintiff's complaint * * * on grounds of res judicata" (Pet. App. A.17). The court of appeals affirmed on the basis of its decision in Sinicropi (Pet. App. A.1-A.11; 623 F.2d 786).

DISCUSSION

This case raises an important question concerning the right of a Title VII plaintiff to pursue his federal discrimination claim in federal court. The particular issue presented is whether a person alleging employment discrimination under Title VII is precluded from bringing an action in federal court following the affirmance by a state appellate court of a state

agency's denial of a discrimination claim brought under state law and arising from the same conduct.[2] The decision below is contrary to the decisions of other courts of appeals and is inconsistent with the statutory scheme of Title VII, which provides for recourse to state procedures as well as to federal court actions as part of a comprehensive scheme of overlapping remedies to combat employment discrimination. The court of appeals' decision would frustrate the broad remedial purpose of Title VII by foreclosing federal litigation of discrimination claims by unwary Title VII complainants. By the same token, the effect of the decision below would be to deter complainants from pursuing their remedies in the state courts, thus undermining the congressional policy of deferring to adjudication of discrimination complaints at the state level. Review by this Court is therefore warranted.[3]

2/ We believe that the preclusion question encompasses both res judicata and collateral estoppel principles. See Allen v. McCurry, No. 79-385 (Dec. 9, 1980). Although both petitioner and the court of appeals have referred exclusively to "res judicata," the question does not fit neatly into the traditional concept of res judicata. Res judicata traditionally applies to bar a claim that was brought or could have been brought in a particular lawsuit. See Allen v. McCurry, supra, slip op. 4. We do not believe that petitioner brought or could have brought his Title VII claim before the state agency. As far as we are aware, petitioner brought only a state discrimination claim before the state agency; it is not at all clear whether that agency also had jurisdiction under state law over his Title VII claim. See N.Y. Exec. Law §§ 296, 300 (McKinney Supp. 1972-1980). Agencies in other states often have jurisdiction under state law over state claims only. See Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1084 (8th Cir.), cert. denied, 446 U.S. 966 (1980). Even if the state agency had jurisdiction over the Title VII claim as a matter of state law, we believe that Title VII supersedes state law and deprives both state agencies and state courts of jurisdiction over Title VII claims (see page 7, note 6, infra). If the principles of res judicata do not apply, the question remains whether a state adjudication has any preclusive effect on federal adjudication by way of collateral estoppel or some other theory.

3/ We do not believe that review is warranted with respect to Question 2 presented in the petition for certiorari, i.e., whether the Second Circuit's decision in Sinicropi v. Nassau County, supra, should be given retroactive effect (see Pet. 15-16 n.*). Resolution of the retroactivity question involves the application of settled principles (see Chevron Oil Co. v. Huson, 404 U.S. 97 (1971)) and turns on a determination of the particular state of the law in the circuit prior to Sinicropi.

1. The decision below is in conflict with the decisions of the Third Circuit in Smouse v. General Electric Co., 626 F.2d 333, 334-336 (1980), and the Eighth Circuit in Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1083-1084, cert. denied, 446 U.S. 966 (1980), holding that a state agency's adjudication of a state discrimination claim -- even after review by a state appellate court -- has no preclusive effect on federal court adjudication of a Title VII claim. While it is true, as respondent points out (Br. in Opp. 13-14), that in both Smouse and Gunther, unlike here, the defendant-employer had initiated judicial review in state court of a state agency determination favorable to the complainant, both courts expressed their disagreement with the Second Circuit's opinion in Sinicropi v. Nassau County, supra, and indicated that their decisions did not turn on which party seeks state court review. See Smouse, supra, 626 F.2d at 336; Gunther, supra, 612 F.2d at 1084 n.6.4/

The decision of the Second Circuit in this case also conflicts in principle with Weahkee v. Perry, 587 F.2d 1256 (D.C. Cir. 1978), Garner v. Giarruso, 571 F.2d 1330 (5th Cir. 1978), Cooper v. Phillip Morris, Inc., 464 F.2d 9 (6th Cir. 1972), and Batiste v. Furnco Construction Corp., 503 F.2d 447 (7th Cir. 1974), cert. denied, 420 U.S. 928 (1975), which hold that federal court adjudication of a Title VII claim is not foreclosed by a state agency's adjudication of a state discrimination claim. We recognize that in each of those cases review of the state agency determination was not pursued in state court, but that distinction does not necessarily provide a basis for reconciling those cases with the decision below. In United States v. Utah Construction & Mining Co., 384 U.S. 394, 421-422 (1966), this Court noted that an administrative agency adjudication may, in appropriate circumstances, be entitled to preclusive effect in

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4/ We note that this Court denied certiorari in Sinicropi prior to the decisions in Smouse and Gunther.

subsequent judicial proceedings. Thus, while 28 U.S.C. 1738 may not require federal courts to give preclusive effect to state administrative agency adjudications,5/ judically-created rules of preclusion may impose such a requirement. See Mitchell v. National Broadcasting Co., supra, 553 F.2d at 268-269. If the court below was correct in concluding that an adjudication by a state administrative agency that has been reviewed by a state appellate court precludes the bringing of a Title VII claim in federal court, then, under the reasoning of Utah Construction & Mining, preclusive effect may also attach in Title VII cases to a state administrative agency adjudication that has not been subjected to review in state court.

In sum, the decision below creates considerable uncertainty as to the availability of federal court actions under Title VII following presentation of a state discrimination claim to a state administrative agency, whether or not review of the state agency adjudication has been sought in state appellate court. This Court should grant review to resolve that uncertainty.

2. The decision below is inconsistent with the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, and the decisions of this Court construing that statute.

a. It is settled that agency adjudication has no preclusive effect on court adjudication of Title VII claims. In Chandler v. Roudebush, 425 U.S. 840 (1976), this Court rejected the argument that an adjudication by the Civil Service Commission precluded court adjudication where the Commission's findings were supported by the clear weight of the evidence. After reviewing the language and legislative history of the 1972 amendments to Title VII (425 U.S. at 848-858), the Court concluded that Sections 706 and 717 gave to both private and federal employees a right to a "judicial trial de novo" (425 U.S. at 858), even after the

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5/ 28 U.S.C. 1738 applies only to prior "judicial proceedings."

completion of agency process. Similarly, in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), this Court stated that "an individual's cause of action is not barred by a Commission finding of no reasonable cause to believe that the statute has been violated." Id. at 48 n.8.

The court of appeals has held, in essence, that state appellate court review of a state agency determination converts an agency adjudication lacking preclusive effect into a court adjudication that bars further judicial proceedings. However, as this Court observed in Chandler v. Roudebush, supra, Congress recognized that "mere appellate review on a substantial-evidence basis following agency adjudication" is substantially different from "plenary adjudication of [complainants'] claims by a federal district court * * *." 425 U.S. at 857. The district court below correctly noted (Pet. App. A.18-A.19) that petitioner did not receive a "court adjudication" of his claim, as contemplated by Title VII; petitioner received no more than substantial-evidence review by a state appellate court. The court of appeals thus erred in concluding that the state court's substantial-evidence review was adequate to do service for the judicial trial de novo to which petitioner, as a Title VII complainant, is entitled.

b. Even if the court of appeals were correct, however, in holding that petitioner received an "adjudicatory process comparable" to court adjudication of his state claim, the court erred in not recognizing that Title VII provides petitioner with a right to federal court adjudication of his Title VII claim.6/ As this Court noted in Alexander v. Gardner-Denver Co., supra, 415 U.S. at 48-49 (emphasis added):

6/ In our amicus curiae brief in Minnick v. California Department of Corrections, No. 79-1213 (June 1, 1981), we argued (at pages 11-15) that federal jurisdiction over Title VII claims is exclusive. We are furnishing copies of that brief to the parties in this case.

> [T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his right under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination.

Only last Term, this Court reiterated that "the 'ultimate authority' to secure compliance with Title VII resides in the federal courts." New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 64 (1980). In Carey, a complainant who had obtained in a state agency adjudication all the relief she had claimed except for an award of attorney's fees asserted that she had a right under Title VII to a federal court adjudication of her claim for attorney's fees. This Court agreed, and made the the following pertinent observations:

> Title VII explicitly leaves the States free, and indeed encourages them, to exercise their regulatory power over discriminatory employment practices. Title VII merely provides a supplemental right to sue in federal court if satisfactory relief is not obtained in state forums. §706(f)(1). One aspect of complete relief is an award of attorney's fees, which Congress considered necessary to the fulfillment of federal goals. Provision of a federal award of attorney's fees is not different from any other aspect of the ultimate authority of federal courts to enforce Title VII. For example, if state proceedings result in an injunction in favor of the complainant, but no award for backpay because state law does not authorize it, the complainant may proceed in federal court to "supplement" the state remedy.

447 U.S. at 67-68.

The decision below thus ignores the carefully crafted enforcement scheme of Title VII, which provides for recourse to federal court "when the State does not provide prompt or complete relief." New York Gaslight Club, Inc. v. Carey, supra, 447 U.S. at 65. While the court of appeals might have believed that the roles of the state and federal forums should be structured differently, "Congress has made the choice, and it is not for [the courts] to disturb it." Chandler v. Roudebush, supra, 425

U.S. at 864. Where, as here, Congress has by statute allowed parties to split related claims and defenses between state and federal forums, neither 28 U.S.C. 1738 nor the judicially-created doctrine of preclusion prevents the relitigation in federal court of claims and issues already litigated before a state tribunal. See Kalb v. Feuerstein, 308 U.S. 433, 443-444 (1940); Voutsis v. Union Carbide Corp., 452 F.2d 889, 893-894 (2d Cir. 1971), cert. denied, 406 U.S. 918 (1972); Restatement of Judgments, Second §61.2(1)(d) (Tent. Draft. No. 5, 1978).7/

Respondent's reliance (Br. in Opp. 15-17, 20) on this Court's recent decision in Allen v. McCurry, No. 79-935 (Dec. 9, 1980), is misplaced. In McCurry, this Court merely held that in enacting 42 U.S.C. 1983 Congress did not intend to permit plaintiffs to relitigate in federal court a claim already determined in state court. Nothing in McCurry suggests that its holding is applicable to Title VII, where, as this Court has noted, Congress specifically allowed plaintiffs to litigate claims independently in state and federal forums.

3. The consequences of the court of appeals' decision are not difficult to discern. As the district court predicted (Pet. App. A.24-A.25), the decision would cause the unwary, like petitioner, to lose their Title VII right to de novo trial in federal court. See Love v. Pullman Co., supra, 404 U.S. at 527. Moreover, the decision would induce the wary to forego state appellate court review of state agency adjudications, "thus encouraging further deterioration of state agency process due to much less frequent state court supervision" (Pet. App. A.22). In addition, as a result of the decision, complainants might withdraw from state agency proceedings prior to final adjudication for fear that the reasoning of Sinicropi would also

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7/ Of course, the state decision "may be admitted as evidence and accorded such weight as the [federal] court deems appropriate." Alexander v. Gardner-Denver Co., supra, 415 U.S. at 60; see also Ibid., n.21.

apply to unreviewed final agency adjudications. This would undermine Title VII's policy of encouraging state and local resolution of discrimination claims. See Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1981

QUESTION PRESENTED

Whether, in an employment discrimination action brought under Title VII, a Federal court is barred from hearing the merits of the claim de novo by the preclusive effect of a state appellate court's confirmation of a state administrative agency's determination rejecting the claim, where (1) Title VII requires prior recourse to the state agency, (2) the state appellate court is limited to a standard of review that precludes any hearing on the merits, and (3) the state agency determination is made without the procedural protections afforded by a Federal court trial?

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IN THE

Supreme Court of the United States

No. 80-6045

OCTOBER TERM, 1981

RUBIN KREMER, *Petitioner,*

v.

CHEMICAL CONSTRUCTION CORPORATION,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF PETITIONER

PRIOR OPINIONS

The opinion of the Court of Appeals for the Second Circuit in this case is reported at 623 F.2d 786 (2d Cir. 1980), and appears at J.A. 69.[1] Two opinions of the United States District Court for the Southern District of New York are reported at 477 F. Supp. 587 (S.D.N.Y. 1979) (Sofaer, J.), and 464 F. Supp. 468 (S.D.N.Y. 1978) (Pierce, J.), and appear respectively at J.A. 55 and J.A. 43.

JURISDICTION

The judgment of the Court of Appeals, entered on June 2, 1980, appears at J.A. 69. Its order of October 15, 1980, denying a timely filed petition for rehearing en

[1] References to the Joint Appendix will be cited as "J.A.".

banc (Judges Oakes and Newman dissenting), appears at J.A. 80. The petition for certiorari was filed on January 13, 1981, and certiorari (limited to the first question presented) was granted on June 22, 1981, together with petitioner's motion for leave to proceed *in forma pauperis*. J.A. 81. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent text of each of the statutes involved in this case appears in the appendix to this brief as indicated:

42 U.S.C. § 2000e-2(a) appears at 1a.
42 U.S.C. § 2000e-5(c) appears at 1a.
42 U.S.C. § 2000e-5(f)(1) appears at 1a-2a.
28 U.S.C. § 1738 appears at 2a.
N.Y. Exec. Law § 295(6)(a) appears at 2a.
N.Y. Exec. Law § 296(1)(a) appears at 2a.
N.Y. Exec. Law § 297-a(7)(d) and (e) appears at 2a-3a.
N.Y. Exec. Law § 298 appears at 3a.
N.Y. Civ. Prac. Law § 7803 (3) and (4) appears at 3a.

STATEMENT OF THE CASE

Petitioner Rubin Kremer is a 63-year-old engineer who emigrated from Poland in 1970. He was fired from his job with respondent Chemical Construction Corporation ("Chemico") and refused reemployment, both allegedly because of his Jewish faith and national origin. Petitioner's employment discrimination complaint under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, was dismissed below on res judicata grounds without any consideration of the merits by a Federal Court.

A. *Facts and State Proceedings*

In May 1976, petitioner filed a *pro se*[2] discrimination charge with the Federal Equal Employment Opportunity Commission ("EEOC"), asserting that Chemico had discharged him and subsequently refused to rehire him because of his national origin and religion, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1974). J.A. 5-8.[3] As required by the "deferral" provisions of Title VII, 42 U.S.C. § 2000e-5(c)(1974), which provide that the EEOC may not consider a claim until a state agency having jurisdiction over employment discrimination complaints has had at least 60 days to resolve the matter, the EEOC referred petitioner's charge to the New York State Division of Human Rights ("NYHRD"). NYHRD is the state agency charged with the enforcement of the New York law prohibiting employment discrimination. N.Y. Exec. Law §§ 295(6), 296(1)(a) (McKinney Supp. 1972-1980).

The investigation conducted by NYHRD was perfunctory at best. A conference at which all parties were to be present was canceled. Instead, Kremer was sum-

[2] Petitioner was without the assistance of counsel until his appeal to the Second Circuit.

[3] Kremer had been hired by Chemico as a piping engineer in 1973. He was the only Jewish employee in his department, J.A. 9, 37, and he alleged that Chemico had signed the "anti-Jewish and anti-Israeli Arab boycott", J.A. 19. Only a month before petitioner's discharge, a supervisor recommended "Hold for knowledge and skills", J.A. 21, 37; other Chemico personnel familiar with his work regarded him as a "technically competent piping analytical engineer" with an "excellent background", J.A. 21. Other employees of the same job description who had been laid off at the same time as petitioner were later rehired, J.A. 8, 19-20, 37, but petitioner was not, despite repeated applications for advertised openings. J.A. 8, 20, 37.

moned by NYHRD to "review" documents submitted by Chemico. J.A. 18-19. During this "review" session, Kremer was admonished, "Read faster, I have to go for lunch".[4] It is unclear what additional investigation, if any, NYHRD undertook (and, indeed, the NYHRD file did not record statements favorable to petitioner, J.A. 19). But it is not disputed that NYHRD never heard any of the witnesses Kremer repeatedly identified. Nor is it disputed that Chemico's written assertions as to the reasons for petitioner's discharge and the refusal to rehire him were never tested in an adversary proceeding. There was no discovery, no formal record was made and petitioner was unrepresented by counsel. Petitioner was not able to call or cross-examine witnesses.

NYHRD thereafter informed petitioner that there was "no probable cause" to believe that Chemico had discriminated in failing to rehire him. J.A. 13-14. As to Kremer's claim that his initial discharge was unlawful, the NYHRD decision was silent.

In pursuit of a hearing at the administrative level, Kremer, still without counsel and following the procedure suggested on the NYHRD form notice, J.A. 14, appealed NYHRD's ruling, first to the New York State Human Rights Appeal Board ("Appeal Board"), and then to the Appellate Division of the State Supreme Court. Under state law, both the Appeal Board and the Appellate Division were limited to determining whether NYHRD's order was "arbitrary and capricious" or "an abuse of discretion."[5] Neither the Appeal Board nor the

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[4] Kremer letter to EEOC, June 15, 1978, at 3.

[5] *See* N.Y. Exec. Law § 297-a(7)(e) (McKinney 1972); N.Y. Exec. Law § 298 (McKinney Supp. 1972-1980); N.Y. Civ. Prac. Law § 7803(3) (McKinney 1981); pp. 22-23, *infra*.

Appellate Division had legal authority to hold a full hearing or to make any independent inquiry into the facts. Indeed, neither had power to do more than remand to NYHRD for reconsideration or further investigation. The Appeal Board affirmed the NYHRD determination, J.A. 15-16, and notified petitioner that any effort to obtain judicial review "shall" be brought in the Appellate Division. J.A. 17.[6] Without oral argument, the Appellate Division "confirmed" the Appeal Board decision. J.A. 25-26.

B. *EEOC Proceedings.*

From the outset, petitioner made manifest his preference for a Federal determination of his claims. He lodged his initial complaint with the EEOC. J.A. 3. He went to NYHRD only on instructions from the EEOC. He returned to the EEOC when NYHRD was slow in reaching a decision. J.A. 45. Indeed, he renewed his EEOC complaint two days *before* filing his appeal to the Appellate Division. J.A. 18-22, 23-24.

The EEOC, however, did not conduct an investigation. Rather, it examined NYHRD's "findings" and "the record presented" and stated that there was "not reasonable cause to believe the charge is true". J.A. 27-28. The EEOC also issued a "Notice of Right to Sue", J.A. 29-31, and informed Kremer that he had the right to "pursue this matter further, if so desired, by filing a private action in Federal District Court." J.A. 27-28.[7]

[6] Consistent with the lower Federal courts' unanimous view of the law as it then existed, *see* cases cited at p. 17, *infra*, this notice did not inform petitioner that such an appeal would waive his right to bring a Title VII action in Federal court. Nor did it explain the narrowly limited standard of review that the Appellate Division would apply.

[7] The EEOC notices thus embodied the EEOC's position that a Federal Title VII action is not barred by a state appellate court review of a state agency determination.

C. Proceedings Below.

Following the instructions in the EEOC's right to sue notice, petitioner brought this Title VII action *pro se* in the district court. J.A. 36-38. Before filing its answer, respondent moved for dismissal of the complaint or for summary judgment on the ground of res judicata. J.A. 39. Relying upon the decision in *Mitchell* v. *National Broadcasting Co.*, 553 F.2d 265 (2d Cir. 1977), Chemico claimed that petitioner's appeal of the NYHRD decision to the Appellate Division precluded a Federal court action under Title VII. *Mitchell* had held that an employment discrimination action brought under 42 U.S.C. § 1981 is barred by the res judicata effect of an Appellate Division appeal of an NYHRD determination.

The District Court initially denied Chemico's motion, refusing to extend the reasoning of *Mitchell* to Title VII cases. *Kremer* v. *Chemical Construction Corp.*, 464 F. Supp. 468 (S.D.N.Y. 1978) (Pierce, J.), J.A. 43-52. Some months later, however, in an unrelated *pro se* case, the Second Circuit held that the rule of preclusion announced in *Mitchell* applied to Title VII actions. *Sinicropi* v. *Nassau County*, 601 F.2d 60 (2d Cir.) (per curiam), *cert. denied*, 444 U.S. 983 (1979). The District Court thereupon reconsidered Chemico's motion to dismiss. Concluding that "*Sinicropi* permits no choice" but to grant the motion, Judge Sofaer nevertheless observed that "[t]o submit to . . . *Sinicropi* . . . is not to agree with [it]", and urged its overruling for numerous reasons. *Kremer* v. *Chemical Construction Corp.*, 477 F. Supp. 587, 591 (S.D.N.Y. 1979) (Sofaer, J.), J.A. 55, 59-60.

Represented by counsel on appeal to the Second Circuit, petitioner sought to overturn *Sinicropi*. Alternatively, he argued that *Sinicropi* should be given prospective effect only. The Court of Appeals panel refused both re-

quests. *Kremer* v. *Chemical Construction Corp.*, 623 F.2d 786 (2d Cir. 1980), J.A. 69-78. Joined by the EEOC as *amicus curiae*, petitioner sought rehearing en banc, again urging that *Sinicropi* be overruled. Rehearing en banc was denied, Judges Oakes and Newman dissenting. J.A. 80.

As a result of these decisions, Rubin Kremer has never had a hearing on his discrimination claim. His only administrative "hearing" was a foreshortened opportunity to state his claim orally to a NYHRD field investigator. His only judicial "hearing" was an appellate review of the administrative "determination" under a legal standard that precluded a de novo judicial inquiry.

SUMMARY OF ARGUMENT

Quite apart from the issues raised by Title VII, the court below misapplied traditional doctrines of res judicata and collateral estoppel.[8] But this is a Title VII case. And the decision below is at odds with Title VII and its unique statutory scheme that Congress designed to eradicate employment discrimination — a policy "of the highest priority". *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 63 (1980), *quoting Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 416 (1978).

[8] For convenience, we will refer in this brief to the claimed preclusive effect of state proceedings upon petitioner's Federal claim as "res judicata". Technically speaking, the traditional concept of res judicata should not apply, since the state proceedings did not, and could not have, considered petitioner's Federal Title VII cause of action. *See* Brief for the United States as Amicus Curiae in Support of the Petition for Certiorari at 4, n.2. The Court of Appeals has referred to the issue as one of "res judicata", however, and whether that term is used, or whether the issue is described as involving "collateral estoppel" or, under 28 U.S.C. § 1738, "full faith and credit" for state court judgments, the same arguments against preclusion of the Federal claim apply.

This Court has repeatedly held that under Title VII a plaintiff has the right to a de novo Federal court hearing of his or her claim. Congress in Title VII provided for limited mandatory recourse to state anti-discrimination procedures as part — but only part — of a comprehensive system of overlapping and supplementary remedies to eliminate employment discrimination. If relief is not obtained under state procedures, Title VII specifically gives plaintiffs the right to seek relief in Federal administrative and, ultimately, judicial forums.

Because Congress has mandated a Federal court forum as a supplement to state remedies, no state proceedings — and certainly not the cursory proceedings which took place in this case — can preclude a subsequent Federal court action. Neither the doctrine of res judicata nor the provisions of 28 U.S.C. § 1738 require otherwise. Res judicata is not applied where doing so would contravene other substantive Federal policies, such as those embodied in Title VII. Similarly, the statutory full faith and credit requirements of section 1738 are overridden by the more specific commands of Title VII. In any event, the issue before the state court — whether administrative rejection of petitioner's claim was arbitrary or capricious — is not the same issue as the Federal court must hear de novo — whether there was in fact discrimination.

Moreover, the limited proceedings in NYHRD followed by a cursory review in state court are in no way a substitute for a de novo hearing before a Federal judge with full rights of discovery, cross-examination and appeal on the complete record so developed. Finally, the doctrine of res judicata is subject to an exemption where there has not been a "full and fair hearing" of the claim in the first forum. In this case, the state proceedings afforded no real "hearing" whatever.

The decision below not only deprives plaintiffs of rights mandated by Title VII, but it will also discourage state court review of state agency proceedings. In order to avoid preclusion of Federal claims, plaintiffs are likely to withdraw from state proceedings at the earliest possible time. State courts will therefore exercise less supervision over state administrative actions and more cases are likely to be brought in Federal court. Thus, the decision below will effectively undermine the very state anti-discrimination procedures that Congress sought to encourage in Title VII.

ARGUMENT

I. Dismissal Of Petitioner's Claim Is Inconsistent With Title VII Law And Policy As Well As Traditional Notions Of Res Judicata

A. *Title VII and Decisions of this Court Give Petitioner the Right to a De Novo Federal Court Hearing on the Merits of His Claim.*

When Congress enacted Title VII, it created "a comprehensive enforcement scheme" for the resolution of employment complaints. *New York Gaslight Club, Inc.* v. *Carey, supra*, 447 U.S. at 63. Under this carefully crafted legal structure, a complainant may not seek relief in the Federal courts unless he or she has (1) submitted the claim under any applicable state or local law to the appropriate state or local agency having jurisdiction over employment discrimination complaints, 42 U.S.C. § 2000e-5(c); and then (2) submitted the claim to the EEOC, 42 U.S.C. § 2000e-5(f)(1). It is only after the state agency and the EEOC have had the opportunity to resolve the case that "a civil action may be brought" in the district court. 42 U.S.C. § 2000e-5(f)(1). *See New York Gaslight Club, Inc.* v. *Carey, supra*, 447 U.S. at 64-65.

It is settled beyond argument that the "civil action" in district court under Title VII must be "a trial de novo". *Chandler* v. *Roudebush*, 425 U.S. 840, 844-45 (1976). *See also Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47-48 (1974); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798-99 (1973). Because Congress "considered the policy against discrimination to be of the 'highest priority'", *Alexander* v. *Gardner-Denver Co., supra*, 415 U.S. at 47, it vested the Federal courts with "final responsibility", *id.* at 44, and "plenary powers", *id.* at 47; *Chandler* v. *Roudebush, supra*, 425 U.S. at 845, for enforcement of Title VII. Under Title VII, a plaintiff has a "statutory right to attempt to establish his claim in a Federal court," *Alexander* v. *Gardner-Denver Co., supra*, 415 U.S. at 56, "if satisfactory relief is not obtained in state *forums*," *New York Gaslight Club, Inc.* v. *Carey, supra*, 447 U.S. at 67 (emphasis supplied).

In the face of such unequivocal expression of Congressional intent, the Second Circuit nevertheless ruled that limited state court review of a state agency determination made without a hearing brought under a state statute converts an agency decision lacking preclusive effect into a court adjudication that bars a Federal court from considering the merits of a Title VII claim. This ruling not only ignores the statutory obligations of Federal courts under Title VII, but misapplies traditional notions of res judicata as well.

B. *The Right to a De Novo Federal Court Hearing Is Not Lost Under Principles of Res Judicata As a Result of Petitioner's State Court Appeal.*

Important values of course underlie the principle of res judicata, including repose, judicial economy and promotion of comity between state and Federal courts. *See Allen* v. *McCurry*, ____ U.S. ____, 101 S. Ct. 411, 415 (1980);

Brown v. *Felsen*, 442 U.S. 127, 131 (1979). While we show below at pp. 25-28, 32-33, that these values are in fact undermined, not promoted, by the decision of the Court of Appeals, the fact is that courts have also long recognized that the doctrine does not require pursuit of these values at all costs. Rather, res judicata is to be applied only after a "careful inquiry", *Brown* v. *Felsen, supra*, 442 U.S. at 132, and a weighing of "competing necessities", *Spilker* v. *Hankin*, 188 F.2d 35, 38 (D.C. Cir. 1951).

Just last Term, this Court indicated that the traditional doctrine of res judicata does not bar a Federal claim "when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." *Allen* v. *McCurry, supra*, 101 S. Ct. at 415. Res judicata attaches only to those issues that actually were or could have been raised in the state court action. *Federated Department Stores, Inc.* v. *Moitie*, ___ U.S. ___, 69 L. Ed.2d. 103, 108 (1981). In this case, of course, petitioner had no opportunity at all to raise the issue of Chemico's discriminatory conduct in state court. The sole issue that the Appellate Division is empowered to review is whether the NYHRD determination was arbitrary and capricious or an abuse of discretion. *See* pp. 22-23 *infra*. It could not consider the issue that the district court must hear under Title VII — whether, in fact, Kremer had suffered discriminatory treatment.*

* If petitioner were seeking Federal court review of the single issue that was actually litigated in state court — whether the NYHRD determination under state law was arbitrary or capricious — his suit might be barred. But that question is not at issue in this Federal Title VII action. *See also* p. 18 n. * *infra*.

In any event, the traditional doctrine of res judicata does not require preclusion of a Federal claim, where, as here, doing so would "submerge the plan of Congress for the administration and enforcement" of a substantive Federal policy, *Denver Building and Construction Trades Council* v. *NLRB*, 186 F.2d 326, 332 (D.C. Cir. 1950), *rev'd on other grounds*, 341 U.S. 675 (1951), or "contravene an overriding public policy", *Tipler* v. *E. I. duPont deNemours & Co.*, 443 F.2d 125, 128 (6th Cir. 1971). *See Brown* v. *Felsen*, *supra*, 442 U.S. at 132; 1B *Moore's Federal Practice* ¶ 0.405 at 783-91 (1980).

In enacting the de novo hearing requirement of Title VII, Congress expressed just this sort of overriding public policy. Recognizing that fact, this Court has found that Title VII permits relitigation of claims that might otherwise be barred by prior determinations. Thus, in *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. 36, 52-54, this Court held that an employee's submission of a discrimination claim to final arbitration under a labor contract did not preclude a Title VII action based on the same facts. The strong Federal policy favoring the finality of arbitral decisions was outweighed by the de novo hearing policy of Title VII. 415 U.S. at 59-60. Just as Title VII grants "a statutory right independent of the arbitration process," *id.* at 54, thereby giving the employee the right to successive hearings of his or her claim, it also grants a right to sue in Federal court that is "independent", *id.* at 48, of any state-created rights. In *Chandler* v. *Roudebush*, *supra*, this Court held that a Civil Service Commission adjudication, which was supported by the clear weight of the evidence and which found that a Federal agency had not acted discriminatorily, nevertheless did not bar a Federal court action under Title VII based on the same facts. *Cf. Barrentine* v. *Arkansas-Best Freight System, Inc.*, ___ U.S. ___, 101 S. Ct. 1437 (1981) (arbitration of

employees' wage and hour dispute does not preclude Federal court action under Fair Labor Standards Act based on same claim).

Similarly, despite the usual applicability of res judicata to the decisions of administrative agencies acting in a judicial capacity, *see, e.g., United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 (1966), the lower Federal courts have uniformly concluded that the application of res judicata to state and local agency determinations would contravene Title VII's de novo trial requirement.[10]

And significantly, with the lone exception of the court below and district courts bound by it, every Federal court, including the Courts of Appeals for the Third and Eighth Circuits, has agreed, for one or more of the reasons discussed here, that a limited state appellate court review of state agency determinations does not bar a subsequent Federal Title VII action.[11]

[10] *See, e.g., Smouse* v. *General Electric Co.*, 626 F.2d 333, 335 (3d Cir. 1980); *Gunther* v. *Iowa State Men's Reformatory*, 612 F.2d 1079, 1084-85 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980); *Batiste* v. *Furnco Construction Corp.*, 503 F.2d 447, 450 (7th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975); *Cooper* v. *Philip Morris, Inc.*, 464 F.2d 9, 11 (6th Cir. 1972); *Voutsis* v. *Union Carbide Corp.*, 452 F.2d 889, 894 (2d Cir. 1971), *cert. denied*, 406 U.S. 918 (1972).

[11] *See Smouse* v. *General Electric Co., supra; Gunther* v. *Iowa State Men's Reformatory, supra; Kralowec* v. *Prince George's County, Md.*, 503 F. Supp. 985 (D. Md. 1980); *Gavin* v. *Peoples Natural Gas Co.*, 464 F. Supp. 622 (W.D. Pa. 1979), *vacated and remanded on other grounds*, 613 F.2d 482 (3d Cir. 1980); *Kremer* v. *Chemical Construction Corp.*, 464 F. Supp. 468 (S.D.N.Y. 1978) (Pierce, J., decided before *Sinicropi*); *Nickel* v. *Highway Industries, Inc.*, 441 F. Supp. 477 (W.D. Wis. 1977); *Gilinsky* v. *Columbia University*, 440 F. Supp. 1120 (S.D.N.Y. 1977); *Al-Hamdani* v. *State University of New York*, 438 F. Supp. 299 (W.D.N.Y. 1977); *Benneci* v. *Department of Labor*, 388 F. Supp. 1080 (S.D.N.Y. 1975); *Young* v. *South Side Packing Co.*, 369 F. Supp. 59 (E.D. Wis. 1973).

In striking out on its own in *Sinicropi* v. *Nassau County*, *supra*, the Second Circuit extended to Title VII cases the reasoning of its earlier decision in *Mitchell* v. *National Broadcasting Co.*, *supra*. As noted above, *Mitchell* held that a state court appeal of an NYHRD determination bars a subsequent action under 42 U.S.C § 1981 in Federal court. While the *Mitchell* court recognized that a proceeding before a state agency did not bar a Federal court action, 553 F.2d at 276, it held that res judicata for section 1981 purposes did attach when a complainant "crosses the line" between state administrative and state judicial proceedings. *Id.*[12] The *Sinicropi* decision then mistakenly assumed, without discussion and without benefit of any argument on the issue, that section 1981 and Title VII are interchangeable for res judicata purposes.[13] They are not.

The statutory scheme of Title VII is altogether "unique" *Gunther* v. *Iowa State Men's Reformatory*, *su-*

[12] However, the *Mitchell* panel premised this holding on its finding that

> "There is little doubt that the issue raised by the § 1981 claim [whether there was in fact discrimination] is identical to the question first presented to the [NYHRD]." 553 F.2d at 270.

But under Title VII, the fact that the "issue" that must be heard in Federal court is the same as the issue initially presented to NYHRD cannot be determinative. Title VII requires resort to the state agency; thus, the issue presented to the state agency is necessarily identical to the one before the Federal court. But, of course, state agency determinations under Title VII never have res judicata effect.

[13] Nor did *Sinicropi* discuss the scholarly criticism of extending *Mitchell* to Title VII actions. See, e.g., Comment, *State Appellate Court Judgment on Employment Discrimination in Res Judicata in Subsequent Federal Action Under Section 1981*, 62 Minn. L. Rev. 987 (1978); Note, *'Twas a Nibble and Not a Bite: Res Judicata and Section 1981*, 53 N.Y.U. L. Rev. 187 (1978).

pra, 612 F.2d at 1084, n.6, having no parallel in those Civil Rights statutes, 42 U.S.C. §§ 1981-1987, which date from the Reconstruction Era. Unlike Title VII, none of the Reconstruction Era statutes contemplates, much less requires, prior recourse to state and Federal administrative remedies. *See, e.g., Goss* v. *Revlon, Inc.*, 548 F.2d 405, 407 (2d Cir. 1976), *cert. denied*, 434 U.S. 968 (1977). They do not establish comprehensive enforcement schemes and timetables into which state anti-discrimination procedures are incorporated. And, unlike Title VII, they have never been held to grant the right to a de novo Federal court hearing.

Congress' concern with the "unique" structure of Title VII remedies was particularly evident in the 1972 amendments to Title VII. As this Court recognized in its extensive analysis of those amendments in *Chandler* v. *Roudebush, supra*, 425 U.S. at 843-61, Congress rejected proposals to create a Federal administrative agency to hear and determine employment discrimination cases, subject to limited judicial review of the administrative record. Faced with a clear choice between "record review of agency action based on traditional appellate standards and trial *de novo* of Title VII claims," Congress chose the latter. *Id.* at 861. Congress thus made clear its intent that the factfinding in Title VII cases ultimately should be done not by administrative agencies, whether Federal or state, but by the courts. It is inconceivable that, as respondent now argues, the same Congress which expressly rejected Federal court "record review" of EEOC determinations impliedly intended to make state appellate court "record review" of state agency determinations a bar to Title VII actions in Federal court.

C. *The Limited Appellate Division Review of the NYHRD Determination Does Not Fulfill The Hearing Requirement of Title VII.*

The structure and legislative history of Title VII leave no doubt that Congress intended that Title VII actions be "trial[s] de novo and not, in any sense, suit[s] for judicial review of [EEOC] determination[s]". Interpretive Memorandum of Senators Clark and Case, 110 Cong. Rec. 7213 (1964). *See also Chandler* v. *Roudebush, supra,* 425 U.S. at 844-45. If a district court may not apply a substantial evidence test to the administrative record, but rather must make "a fresh determination of the facts and issues", *Weahkee* v. *Perry,* 587 F.2d 1256, 1263 (D.C. Cir. 1978), then surely a state proceeding in which the courts do anything less fails to satisfy the Congressional requirement for de novo judicial consideration. The combination of state agency proceedings and Appellate Division review under an "arbitrary and capricious" standard fails to meet the de novo hearing requirements of Title VII.

In *Alexander* v. *Gardner-Denver Co., supra,* this Court found "arbitral processes [to be] comparatively inferior to judicial processes in the protection of Title VII rights." 415 U.S. at 57. Chief among the reasons was that "the factfinding process in arbitration usually is not equivalent to judicial factfinding":

> "The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. . . . [I]t is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the Federal courts." *Id.* at 57-58.

The factfinding process in state and local anti-discrimination agencies is often subject to these same procedural infirmities.[14] Because their chief purpose is to "settle disputes through conference, conciliation, and persuasion", *cf. Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 44, agency factfinding procedures are relatively informal. In the present case, which is by no means exceptional, *see, e.g., Sinicropi* v. *Nassau County, supra,* 601 F.2d at 62, NYHRD did not even conduct an evidentiary hearing. Rather, its decision to dismiss petitioner's charge was based on an informal *ex parte* interview and written submissions. NYHRD never heard any of the witnesses petitioner identified. It did not require Chemico to submit to cross-examination under oath. It afforded petitioner only a hurried "review" of Chemico's submissions. It made no formal record. Such procedures may be well-suited to the settlement of disputes through conference, conciliation, and persuasion. But they are not adequate for final resolution of the merits of Title VII claims.

The built-in limitations of NYHRD's procedures were not cured by the very limited judicial review in the Appellate Division. Under New York law, review of determinations by the NYHRD and the Human Rights Appeal Board may be obtained only pursuant to Executive Law

[14] *See, e.g., Smouse* v. *General Electric Co., supra,* 626 F.2d at 335; Comment, 62 Minn. L. Rev., *supra;* Report of the New York State Bar Association Joint Task Force on the Practices and Procedures of the New York State Division of Human Rights and the New York State Human Rights Appeal Board (April 1981) (Documenting inadequate "written standards and guidelines for [NYHRD] investigations" and "poorly conducted investigations, inadequate retention of notes, and the absence of sufficient information to enable the Appeal Board to conduct an adequate review of no-probable-cause findings", *id.* at 16-17).

§ 298 or Civil Practice Law Art. 78. Under either provision, when a complaint is dismissed for lack of probable cause, review is strictly limited to consideration of whether the administrative action was arbitrary and capricious or an abuse of discretion. *See Mize* v. *State Division of Human Rights*, 33 N.Y.2d 53, 57, 304 N.E.2d 231, 233, 349 N.Y.S.2d 364, 367-368 (1973).[15]

Such limited appellate review has no alchemistic powers. It cannot transform a perfunctory, informal administrative investigation, such as was conducted in this case, into the equivalent of the judicial trial de novo mandated by Congress. Thus, for res judicata purposes, the "crucial inquiry" is "how the [state antidiscrimination agency] proceeds". *Smouse* v. *General Electric Co.*, *supra*, 626 F.2d at 336. The line drawn by the Second Circuit in *Sinicropi* between state administrative and state judicial proceedings, 601 F.2d at 62, is, then, altogether arbitrary. All of the reasons which dictate that state agency determinations not be given preclusive effect carry over with undiminished force to state court appeals of such determinations made under a limited standard of review.

One result of the line drawn by the Court of Appeals between administrative remedies (which do not bar Federal claims) and limited judicial review (which does), is to make a distinction among Title VII plaintiffs that is wholly irrational. Thus, under the Second Circuit's rule, a complainant who is accorded thorough administrative proceedings, including an evidentiary hearing, an admin-

[15] If the NYHRD determination is made on the record after a public hearing, it is reviewed under a substantial evidence standard, rather than an arbitrary and capricious test. *Mayo* v. *Hopeman Lumber & Mfg. Co.*, 33 A.D.2d 310, 313, 307 N.Y.S.2d 691, 694 (4th Dep't), *appeal dismissed*, 26 N.Y.2d 962, 259 N.E.2d 477, 311 N.Y.S.2d 5 (1970).

istrative appeal on a complete factual record, or even an award of relief, but who stops short of seeking review in the state courts, is free to pursue non-duplicative Federal remedies under Title VII. As this Court held in *New York Gaslight Club, Inc.* v. *Carey, supra*, a complainant who is awarded backpay and reinstatement after a full NYHRD hearing can still pursue an action in Federal court to obtain attorneys' fees. In contrast, a complainant, like petitioner, whose complaint is summarily dismissed by the state agency without an evidentiary hearing, whose administrative appeal is conducted without benefit of a genuine factual record, and who is awarded no relief whatever, is barred from Federal court — simply because he or she asked a state court to order the agency to grant the evidentary hearing that the hypothetical first complainant has already had. Such a result cannot possibly be squared with the structure and intent of Title VII.

D. *The Decision Below Is Also Inconsistent With Congress' Intent To Encourage Full Use Of State Antidiscrimination Remedies.*

In enacting Title VII, Congress established a "comprehensive enforcement scheme," *New York Gaslight Club, Inc.* v. *Carey, supra*, 447 U.S. at 63, in which state and Federal administrative agencies, as well as Federal courts, are assigned specific roles. On the one hand, Congress desired that employment discrimination disputes be resolved at the state or local level whenever possible. *See* 110 Cong. Rec. 12725 (1964) (remarks of Sen. Humphrey); *Alexander* v. *Gardner-Denver Co., supra*, 415 U.S. at 44. It therefore created the structure for the referral and deferral procedures, *see* 42 U.S.C. § 2000e-5(c), whereby state and local agencies are given a "limited opportunity to resolve problems of employment discrimination," *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 755

(1979), before the aggrieved party may complain to the EEOC, or if unsatisfied there, to a Federal court. Prior resort to the appropriate state agencies is mandatory under Title VII. *Love* v. *Pullman Co.*, 404 U.S. 522, 523 (1972). On the other hand, Congress understood full well that state and local antidiscrimination laws "very widely in effectiveness [and that in] many areas effective enforcement is hampered by inadequate legislation, inadequate procedures, or an inadequate budget". 110 Cong. Rec. 7205 (1964) (remarks of Sen. Joseph Clark, cosponsor of the 1964 Act). It therefore afforded complainants the right to a Federal forum when the state fails to provide "prompt or complete relief". *New York Gaslight Club, Inc.* v. *Carey, supra*, 447 U.S. at 65.

The comprehensive framework established by Title VII is one in which state and Federal remedies are "complementary". *Voutsis* v. *Union Carbide Corp., supra*, 452 F.2d at 894. Title VII remedies are intended to "supplement rather than supplant" state and local remedies. *Alexander* v. *Gardner-Denver Co., supra*, 415 U.S. at 48. "Congress envisioned that Title VII's procedures and remedies would 'mes[h] nicely, logically, and coherently with the State and city legislation,' and that remedying employment discrimination would be an area in which '[t]he Federal Government and the State governments could cooperate effectively'." *New York Gaslight Club, Inc.* v. *Carey, supra*, 447 U.S. at 63-64, (quoting remarks of Sen. Clark at 110 Cong. Rec. 7205 (1964)).

Henceforth, however, if the *Sinicropi* rule is allowed to stand, well-informed Title VII plaintiffs will not appeal NYHRD determinations to the Appellate Division. Rather, they will bypass the state courts entirely and go directly to Federal court. Neither Congress' intent "to encourage full use of state remedies", *New York Gaslight*

Club, Inc. v. *Carey, supra,* 447 U.S. at 66, n. 6, nor the policy of comity, is well-served by a res judicata rule which encourages wholesale abandonment of the state judicial process.[16]

The inevitable long-term effect of *Sinicropi* will be to undermine the effectiveness of state and local anti-discrimination agencies. For an administrative system from which appeals are rarely, if ever, taken is destined to deteriorate in quality. Without continuous judicial supervision, uniform standards will not be maintained, agency excesses will not be checked, and procedures will not be improved. As a result, even more complainants will desert the state administrative system at the earliest point permitted by the deferral provisions. *Sinicropi,* then, will lead to the gradual displacement of state remedies by Federal remedies — "a strange version of comity", as Judge Sofaer put it below. *Kremer* v. *Chemical Construction Corp., supra,* 477 F. Supp. at 592, J.A. 63. By undermining the vitality and effectiveness of state and local agencies, *Sinicropi* contravenes the "policy of cooperation", *New York Gaslight Club, Inc.* v. *Carey, supra,* 447 U.S. at 64, between the Federal and state systems which is a keystone of Title VII's grand design.[17]

[16] Where, as here, the state appellate court can grant no relief other than a remand to the state agency for further investigation or proceedings, the appeal is properly viewed as *part* of the administrative process. The *Sinicropi* rule disrupts that process by deterring plaintiffs from seeking court assistance in getting it to work.

[17] The *Sinicropi* rule is inconsistent with Congressional intent in several additional respects. First, it contravenes Congress' intent "to accord parallel or overlapping remedies against discrimination", *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 47, and "to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes", *id.* at 48. This provision of multiple avenues of relief reflects Congress' view

II. Petitioner's Federal Court Action Is Not Barred By 28 U.S.C. § 1738 Or By Considerations Of Comity.

A. *Section 1738 is Subject to the Same Limitations as the General Doctrine of Res Judicata and Does Not Bar a Federal Action Where There Was Not A "Full and Fair Opportunity" To Litigate the Claim in State Court.*

The *Sinicropi* decision relied implicitly on 28 U.S.C. § 1738 in finding that a state court appeal bars a Federal action based on the same operative facts. *See Mitchell* v. *National Broadcasting Co., supra,* 553 F.2d at 271-77. In the context of Title VII, the Second Circuit was wrong — and, indeed, it was wrong under section 1738 without regard to Title VII considerations.

To be sure, section 1738 ordinarily requires Federal courts to give preclusive effect to state court judgments

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that the elimination of employment discrimination is of "the highest priority". *New York Gaslight Club, Inc.* v. *Carey, supra.* The duplication of judicial effort and increased burden on defendants which may result are costs that Congress knowingly decided to incur. It is not for the courts to overturn that decision, See *Chandler* v. *Roudebush, supra,* 425 U.S. at 864.

Second, the *Sinicropi* rule undercuts Congress' reliance on private litigation to secure broad compliance with Title VII. The Title VII litigant is a private attorney general, vindicating an important public policy. *New York Gaslight Club, Inc.* v. *Carey, supra,* 447 U.S. at 63, *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 45. By placing an unnecessary stumbling block in the way of the unwary private litigant, the *Sinicropi* rule may sometimes shield a discriminatory employer from the reach of civil litigation. *Cf. Voutsis* v. *Union Carbide Corp., supra,* 452 F.2d at 892.

Third, the *Sinicropi* rule is at odds with Title VII's remedial purpose. Plaintiffs under Title VII "should not be held accountable for a procedural prescience that would have made a Baron Parke happy or a Joseph Chitty proud." *Voutsis* v. *Union Carbide Corp., supra,* 452 F.2d at 892.

whenever the court of the rendering state would do so. Section 1738, however, like the doctrine of res judicata discussed above at pp. 13-20, is subject to exceptions. Where "other well defined federal policies, statutory or constitutional", outweigh the policies underlying § 1738, a Federal court will not follow the state rule of repose. *American Mannex Corp.* v. *Rozands*, 462 F.2d 688, 690 (5th Cir.), *cert. denied*, 409 U.S. 1040 (1972). *Accord, Batiste* v. *Furnco Construction Corp., supra*, 503 F.2d at 450. Since, as shown above, Congress specifically intended in Title VII to provide for de novo Federal court determination of the merits of employment discrimination claims and to encourage full use of state remedies, the "well-defined . . . policies" of Title VII supersede the general provisions of section 1738. *See* Currie, *Res Judicata: The Neglected Defense*, 45 U. Chi. L. Rev. 317, 333 (1978) (Congress can grant the "extraordinary option of relitigating issues pertinent to state court litigation"). Unlike the situation in *Allen* v. *McCurry, supra*, where Congressional intent to override section 1738 and common law preclusion rules was "equivocal", 101 S. Ct. at 417, intent here is clear and already recognized in this Court's earlier decisions. Preclusion would undermine a Congressional plan to enforce a national policy of the "highest priority".[18]

[18] In *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355 (1977), this Court held that state statute of limitation periods will not be borrowed by Federal courts in Title VII actions where their application would frustrate the implementation of the policies underlying Title VII. The reasoning of *Occidental Life* is equally compelling here. Just as the states, in establishing general limitations periods, could not have taken into account the specific decision of Congress to delay judicial action on Title VII claims until the EEOC and state agencies had performed their statutorily mandated responsibilities, *id.* at 368, so too the states, in fashioning general res judicata rules, could not have taken into account the specific decision of Congress to afford

B. ***In Any Event, This Title VII Action Is Not A Collateral Attack On A State Court Judgment But Rather an Assertion Of An Independent Federal Statutory Right.***

Chemico has claimed that petitioner is seeking "license" for the Federal courts "to review the judgments of state courts". Brief in Opposition to Petition for Certiorari at 21. Petitioner is seeking nothing of the kind. As noted above at pp. 14-15, petitioner is only seeking de novo Federal court determination of an issue that the Appellate Division did not and could not have decided — whether Chemico in fact discriminated against him. *See Benneci* v. *Department of Labor, supra,* 388 F. Supp. at 1082. *Cf. Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 54 (in instituting a Title VII action, "the employee is not seeking review of the arbitrator's decision. Rather, he is asserting a statutory right independent of the arbitration process".)

Concerns about comity are entirely misplaced in this sort of case. In *Allen* v. *McCurry, supra,* this Court held that a plaintiff under section 1983 may not relitigate search and seizure questions in Federal court that were fully and fairly litigated in a state criminal proceeding. To allow such relitigation, absent a clear Congressional directive, would be a direct affront to the state court. It would imply that state court judges are less capable of finding facts or less zealous in their defense of Federal rights. In contrast, de novo consideration in this case

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Title VII plaintiffs de novo Federal court consideration when state antidiscrimination procedures fail to afford complete relief. In each case, "it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies". *Id.* at 367. Yet just such "frustration" would occur if state res judicata law is "imported" through section 1738 without regard to the structure and intent of Title VII.

would carry no such implication, because no facts whatever were found by the state court.[19] As the district court noted, "comity has generally been understood to require deference to state decisions based on the same scope of review applied in comparable federal proceedings." *Kremer* v. *Chemical Construction Corp., supra,* 477 F. Supp. at 592, J.A. 63.

III. The Decision Below Is Unwise As A Matter Of Judicial Administration.

If the decision below stands, no well-informed litigant will appeal NYHRD determinations to the Appellate Division. This will have two unwelcome consequences. The first, as discussed above at pp. 26-27, will be a deterioration of the state administrative process. The second will be an increase in the Federal court caseload. Employment discrimination disputes which might otherwise have been resolved by state agencies after a state court remand will now come directly to the Federal courts. Their numbers may well exceed the number of Federal cases that can be dismissed on res judicata grounds, since plaintiffs will soon learn not to blunder across the line from state agencies to state courts.[20] *Sinicropi* may perhaps win a short-lived respite for the overburdened Federal courts. But in the long run, it is penny-wise and pound-foolish. Once plaintiffs get wise, the result will be more, not less, Title VII litigation in the Federal courts. In *Alexander* v. *Gardner-Denver, supra,* this Court specifi-

[19] The fact that the Federal court is not bound by the cursory conclusions of NYHRD is no more an affront to the state agency or court than the de novo trial requirement is an affront to the EEOC's fact-finding ability.

[20] If the decision below stands, the EEOC and state agencies will surely start to inform complainants that an Appellate Division appeal will foreclose a Title VII action in Federal Court.

cally addressed an analogous issue. It rejected preclusion by arbitral proceedings in part because it would induce employees to "bypass arbitration and institute a lawsuit", resulting in "more litigation, not less". *Id.* at 59. The *Sinicropi* rule will have the same effect.

Moreover, whatever conservation of Federal court resources is achieved by *Sinicropi* will be at the expense of the unwary and the uninformed. *Pro se* plaintiffs like petitioner are especially likely to fall into *Sinicropi's* trap. This is a particularly troubling prospect, given the broad remedial and protective purposes of Title VII. To be sure, judicial economy comes only at a price. But if a Title VII plaintiff must settle for a cursory state administrative procedure and a sharply restricted state court review instead of the Federal hearing on the merits to which he or she has a statutory right, then the price is too high.

CONCLUSION

For the reasons discussed above, the judgment of the Court of Appeals should be reversed and the case remanded for trial.

Respectfully submitted,

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APPENDIX

APPENDIX

Pertinent Parts of Statutes Involved

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

42 U.S.C. § 2000e-2. *Unlawful Employment Practices*

"(a) It shall be an unlawful employment practice for an employer—

> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . ."

42 U.S.C. § 2000e-5. *Enforcement Provisions*

> ". . . .
>
> "(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section [with the EEOC] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated . . .
>
> ". . . .
>
> "(f)(1) . . . If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission . . . the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved. . . ."

FULL FAITH AND CREDIT

28 U.S.C. § 1738. *State and Territorial Statutes and Judicial Proceedings: Full Faith and Credit*

"The records and judicial proceedings of any court of any . . . State, Territory or Possession . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

NEW YORK STATE HUMAN RIGHTS LAW

N.Y. EXEC. LAW § 295. *General Powers and Duties of Division*

"The [Human Rights] division, by and through the commissioner or his duly authorized officer or employee, shall have the following functions, powers and duties:

". . . .

"6. (a) To receive, investigate and pass upon complaints alleging violations of this article. . . ."

N.Y. EXEC. LAW § 296. *Unlawful Discriminatory Practices*

"1. It shall be an unlawful discriminatory practice: (a) For an employer . . . because of the age, race, creed, color, national origin, sex, or disability, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual . . ."

N.Y. EXEC. LAW § 297-a. *State Human Rights Appeal Board*

". . . .

"7. The [Human Rights Appeal] board may affirm, remand or reverse any order of the [Human Rights] division or remand the matter to the division for further proceedings in whole, or with respect to any part thereof, or with respect to any party, provided however that the board shall limit its review to whether the order of the division is:

". . . .

"d. supported by substantial evidence on the whole record; or

"e. not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

N.Y. EXEC. LAW § 298. *Judicial Review and Enforcement*

"Any complainant . . . aggrieved by any order of the [Human Rights Appeal] board may obtain judicial review thereof . . . in a proceeding as provided in this section. Such proceeding shall be brought in the appellate division of the supreme court. . . ."

NEW YORK CIVIL PRACTICE LAW

N.Y.C.P.L.R. § 7803. *Questions Raised*

"The only questions that may be raised in a proceeding under this article are:

". . . .

"3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

"4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence."

BRIEF AND SUPPLEMENTAL APPENDIX OF RESPONDENT

QUESTION PRESENTED

Whether principles of res judicata and comity, as embodied in 28 U.S.C. § 1738, prevent relitigation in federal court, under Title VII of the Civil Rights Act of 1964, of an employment discrimination claim adversely disposed of by a final judgment of a New York state court.[1]

[1] Respondent, Chemical Construction Corporation, is a wholly-owned subsidiary of Aerojet-General Corporation, which, in turn, is a wholly-owned subsidiary of The General Tire and Rubber Company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-6045

RUBIN KREMER,

Petitioner,

-v-

CHEMICAL CONSTRUCTION CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

A. The Proceedings Below

On June 2, 1980 the Court of Appeals for the Second Circuit unanimously affirmed[2] the dismissal by the District Court for the Southern District of New York of petitioner's action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* (1976), because of the preclusive effect of a New York appellate court judgment which had rejected the identical employment discrimination claim made by petitioner under the New York Human Rights Law.[3]

[2] The decision of the Court of Appeals is reported at 623 F.2d 786 (1980) and appears at page 69 of the Joint Appendix. Subsequent references to the Joint Appendix will be cited as "J.A.".

[3] The Court of Appeals subsequently denied both Mr. Kremer's petition for rehearing and his suggestion for rehearing *en banc*. (J.A. 79, 80)

Shortly after this case was filed in the District Court on July 14, 1978, respondent, Chemical Construction Corporation ("Chemico"), moved, pursuant to Rule 12, F.R.Civ.P., for dismissal, or alternatively for summary judgment, on the ground that petitioner was precluded by principles of res judicata and collateral estoppel and by 28 U.S.C. §1738 from relitigating the identical claim of unlawful employment discrimination previously litigated unsuccessfully by him against Chemico before the New York Division of Human Rights and a New York state court. (J.A. 39) The District Court denied Chemico's motion on December 7, 1978, but following the Second Circuit's decision in *Sinicropi* v. *Nassau County*, 601 F.2d 60 (2d Cir.), *cert. denied*, 444 U.S. 983 (1979) ("*Sinicropi*"), reconsidered Chemico's motion, granted it, and dismissed the action.[4]

On appeal, the Second Circuit, declining petitioner's invitation to reconsider *Sinicropi*, affirmed. (J.A. 69); 623 F.2d 786 (1980). This Court granted certiorari on June 22, 1981.[5] (J.A. 81)

B. Petitioner's Employment by Chemico[6]

In early 1973, petitioner, a 53-year old Jewish emigre from Poland, applied for employment with Chemico as a piping engineer. Chemico hired him. (J.A. 9) His performance ratings

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[4] The opinion of the District Court granting Chemico's motion to dismiss is reported at 477 F.Supp. 587 (S.D.N.Y. 1979) (Sofaer, J.) and appears at J.A. 55; the District Court's order dismissing the complaint appears at J.A. 68; the prior opinion of the District Court denying Chemico's motion is reported at 464 F.Supp. 468 (S.D.N.Y. 1978) (Pierce, J.) and appears at J.A. 43.

[5] The greater part of the opinion of the Court of Appeals was devoted to discussion of petitioner's argument that *Sinicropi* should not have been applied "retroactively" to preclude his claim. The Court of Appeals rejected this contention, and this Court excluded the "retroactivity" question from its grant of certiorari.

[6] Because petitioner has attacked the state administrative proceedings at issue here as "perfunctory at best" (Pet. Brief, p. 3) but, nonetheless, over Chemico's objection, refused to print in the Joint Appendix any but a few pages from the record of those proceedings which petitioner himself filed in the District Court, Chemico has printed additional parts of that record in the Supplemental Appendix to this brief. Reference to the Supplemental Appendix will be cited as "S.A.". For the same reason, Chemico describes the prior administrative and judicial proceedings in greater detail than would normally be necessary in a res judicata case.

during two years of work at Chemico were mediocre to "below average". (S.A. 26, 37) On August 1, 1975, he and other employees were laid off. (J.A. 9)

Three weeks later petitioner sent a letter to Chemico's President complaining that his layoff was the "result of a long time period of conspiracy" by two fellow employees and characterizing his supervisor as "a tool of power". (S.A. 3) Then, beginning in November, 1975, petitioner sent to Chemico and one of its affiliates at least five applications seeking re-employment (S.A. 13-20), exchanged additional letters with Chemico's Vice President of Employee Relations and had several conversations with officials of the company to discuss his grievances concerning the "conspiracy" against him by fellow employees. (S.A. 5, 6, 33, 48) In none of these communications—which continued for more than a year—did Mr. Kremer claim that his discharge or Chemico's failure to rehire him was due to any of the unlawful grounds asserted in his Title VII suit.

C. Petitioner's Proceeding Before the New York Division of Human Rights

Petitioner's first claim of discrimination against Chemico came in a "Charge of Discrimination" filed by him with the United States Equal Employment Opportunity Commission ("EEOC") on May 6, 1976. (J.A. 5) In filing his "Charge of Discrimination", Mr. Kremer completed a form prepared and supplied by the EEOC, near the top of the first page of which, under the heading "Cause of Discrimination", he placed "X's" in two boxes labelled "Religious Creed" and "National Origin". Under the heading on the form directing him to "explain what unfair thing was done to you" petitioner wrote out a lengthy recital of his grievances. Except for brief allusions to his belief that prior to his termination Chemico had not utilized his talents productively, petitioner's grievances concerned almost exclusively Chemico's refusal to rehire him when it had hired or rehired three individuals, Parish Shah, Nevin Shah and Tapan Banerjee. (J.A. 8) Nowhere in that narrative of his claim did petitioner charge Chemico with *any* discriminatory conduct based upon either his religious creed or national origin.

Upon receiving petitioner's charge, and as required by Title VII and by its own regulations, the EEOC deferred action upon it for 60 days and referred petitioner and his claim to the New York State Division of Human Rights (the "NYHRD"), the state administrative agency charged with enforcing the New York Human Rights Law and with adjudicating claims arising under it.

Pursuant to the deferral scheme of section 706 of Title VII, 42 U.S.C. § 2000e-5, the EEOC has designated the NYHRD as a "706 Agency", to which the EEOC has determined it appropriate to refer claims arising under Title VII. Under the EEOC's regulations, it was authorized to designate the NYHRD as a deferral agency, and to continue that designation in effect, only after examining New York's anti-discrimination laws and the NYHRD's rules, regulations and interpretative guidelines[7] and after rendering a determination as to the NYHRD's

> willingness and ability to administer its law in such a manner that, in fact, the practices prohibited are comparable in scope to those practices prohibited under Federal law . . .

and that

> [i]n all cases where the 706 Agency finds cause to credit the allegations of the charge, it shall effectively eliminate the discrimination and, where State or local law allows, provide for full compensation and prospective relief consistent with applicable Federal law.

29 C.F.R. §1601.12(j) and (j)(1) (1975), reprinted at S.A. 60.

When the EEOC has determined that a state administrative body qualifies as a "706 Agency" and after issuing the appropriate designation, section 706 requires the EEOC to defer action upon a private claimant's Title VII charge for 60 days.

Petitioner filed a complaint with the NYHRD on May 20, 1976 (J.A. 9), charging Chemico with "an unlawful discrimina-

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[7] 29 C.F.R. § 1601.12(c),(f), & (j) (1975), reprinted at S.A. 59-60.

tory practice relating to employment in violation of Article 15 of the Executive Law of New York".[8] Upon the filing of a complaint, the NYHRD was required to undertake a prompt investigation to determine whether there was probable cause to believe that the alleged discrimination had occurred.[9] In conducting its investigation, the NYHRD must afford a complainant a full and fair opportunity to present evidence on the record in support of his claim. Under the NYHRD's procedures, a claimant may offer his own testimony, that of other witnesses, and may submit exhibits. The NYHRD is empowered to interview the respondent's witnesses, as well as a claimant's, and to require the respondent to reply to the charge and to produce documentary evidence.[10] A *pro se* claimaint, moreover, may request the NYHRD to issue subpoenas compelling the attendance of witnesses and the production of documents.[11] Although the NYHRD specifically advised him of his right to do so, petitioner called no witnesses to testify on his behalf before the NYHRD, submitted no list of witnesses, and requested the issuance of no subpoenas. (S.A. 1)[12]

Chemico submitted documentary evidence to the NYHRD, including petitioner's personnel files and the names, ages, and periods of service of its Jewish and other employees. Petitioner was afforded an opportunity by the NYHRD to examine and to respond in writing to all these documents produced by Chemico.

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[8] N.Y. Human Rights Law §296(1)(a), N.Y. Exec. Law §296 (1)(a) (McKinney Supp. 1972-1980), reprinted at S.A. 61.

[9] N.Y. Exec. Law §297(2) (McKinney 1972), reprinted at S.A. 61.

[10] *See, State Division of Human Rights ex rel. Speller* v. *New York State Drug Abuse Control Comm.*, 59 A.D.2d 332, 399 N.Y.S.2d 541, 543-44 (1977); *Mayo* v. *Hopeman Lumber & Manufacturing Co.*, 33 A.D.2d 310, 307 N.Y.S.2d 691 (1970); *Mitchell* v. *National Broadcasting Co.*, 553 F.2d 265, 270 (2d Cir. 1977) ("*Mitchell*"), and discussion at pp. 16–17, *post*.

[11] The NYHRD's regulations provide that: "Subpoenas and subpoenas *duces tecum* may be issued by the designated division officers and employees upon the application of a party or a party's attorney". Rules of Practice and Procedure of the Division of Human Rights, 9 N.Y.C.R.R. 465.12(c) (1977), reprinted at S.A. 64; see *id.*, §465.10 (1975), cited in *Mitchell, supra*, 553 F.2d at 271 n. 7.

[12] The NYHRD also advised petitioner on two separate occasions of his right to be represented by counsel. (S.A. 1, 66)

(S.A. 1, 7, 44, 45) He did both. (S.A. 34, 35, 36, 37, 38, 39, 40, 41, 42, 43) In addition, he met on at least two occasions with officials of the NYHRD to argue his case orally and to discuss and rebut the responses and documents filed by Chemico. (S.A. 68, 71)[18] He also met with the NYHRD's Regional Director and stated his case to him. (S.A. 45)

Following its investigation into petitioner's charge and its review of the documents produced by Chemico and of petitioner's arguments and responses thereto, the NYHRD issued a "Determination and Order After Investigation" on April 28, 1977 (the "Determination and Order"), finding there to be "no probable cause to believe that the respondent engaged in or was engaged in the unlawful discriminatory practice complained of." (J.A. 13) It based its ruling upon its determination that:

> The record shows that this complainant was not rehired by the respondent employer because one employee with greater seniority was chosen.
>
> The other person that was rehired, filled a lesser position than that held by complainant.
>
> Complainant's creed, or age, was not a factor in these selections.

Id.

The NYHRD thereupon dismissed petitioner's complaint. *Id.*

D. Petitioner's Proceeding Before the Appeal Board

Although not required to do so in order to pursue his Title VII claim, Mr. Kremer appealed the NYHRD's Determination and Order to the New York State Human Rights Appeal Board (the

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[18] The only evidence in the record to support petitioner's assertion (Pet. Brief, p. 4) that at one of these sessions a NYHRD representative aborted his effort to examine the documents by saying "Read faster, I have to go for lunch" is a letter submitted by petitioner to the EEOC more than a year later. (S.A. 69) In that same letter, which petitioner excluded from the Joint Appendix, he stated that, at that same meeting with NYHRD, "I verbally refuted all the respondents statements entirely and demonstrated with documents that they are untrue and false" and cited the portions of the record containing those "refutations." (S.A. 68)

"Appeal Board") on May 10, 1977. In his appeal he argued that Chemico had discriminated against him and that the NYHRD had failed to give him an adequate and procedurally fair hearing. (S.A. 8–11) In addition, petitioner—for the first time—submitted a list of witnesses whom he wished to call to testify on his behalf. (S.A. 12) These witnesses, who could have been heard at the NYHRD level, were not able to testify before the Appeal Board—which, as an appellate body, lacked authority to hear testimony.

The Appeal Board is an adjudicatory authority within the Executive Department and is independent of the NYHRD. N.Y. Exec. Law §297-a(1) (McKinney Supp. 1972-80), reproduced at S.A. 61; *Mitchell* v. *National Broadcasting Co.*, 553 F2d 265, 267 n.4 (2d Cir. 1977) ("Mitchell"). Its decisions are final and binding on the NYHRD, except as they are modified upon further appeal. N.Y. Exec. Law §297-a(7) (McKinney 1972).[14]

On September 16, 1977, after submitting his arguments in writing (S.A. 8–11), petitioner appeared before the Appeal Board and orally argued his case. (*See* J.A. 15) On November 25, 1977, after reviewing the record, the Appeal Board affirmed the Determination and Order of the NYHRD. (J.A. 16)

E. Petitioner's Proceeding in the Appellate Division

After the Appeal Board had affirmed the NYHRD's dismissal of his charge, petitioner had several options available to him. He had already pursued his state administrative remedies far longer

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[14] The scope of the Appeal Board's review is limited to determining:
whether the order of the division is:
a. *in conformity with the constitution and the laws of the state and the United States;*
b. within the division's statutory jurisdiction or authority;
c. made in accordance with procedures required by law or established by appropriate rules or regulations of the division;
d. supported by substantial evidence on the whole record, or
e. not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
N.Y. Exec. Law §297-a(7) (emphasis added).

than required by Title VII,[15] and, with his appeal to the Appeal Board, he had exhausted those remedies. At this point, Mr. Kremer did return to the EEOC—on December 4, 1977—to urge it to take up his claim. (J.A. 18) Two days later, however, he embarked upon a second course of action which the Court of Appeals found to be of controlling significance. He decided to step outside the EEOC and state administrative framework of Title VII by instituting a judicial proceeding in the Appellate Division of the New York Supreme Court (the "Appellate Division") for review of the order of the Appeal Board. (J.A. 23) The Appellate Division, of course, is not a "706 Agency". Rather, it is the second highest court in New York, empowered with general jurisdiction over appeals from trial level courts and with jurisdiction over special proceedings relating to administrative agency actions.[16] Mr. Kremer's petition in the Appellate Division asserted that his appeal was taken pursuant to both section 298 of the Human Rights Law[17] and Article 78, N.Y. Civ. Prac. Law §7801 *et seq* (McKinney 1981).[18]

Under section 298 of the Human Rights Law, the Appellate Division has authority to enforce, modify or set aside the order appealed from. N.Y. Exec. Law §298, reprinted at S.A. 62-63. It may also remit a case to the NYHRD for further proceedings if

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[15] The 60-day deferral period had expired on July 19, 1976, before the NYHRD had acted on his claim and more than a year before the Appeal Board upheld the NYHRD's determination in November of 1977. Petitioner was free at any time after July 19, 1976 to return to the EEOC to press his claim.

[16] N.Y. CONST. Art. 6, §§4(k), 5(a) (1961); N.Y. CIV. PRAC. LAW §7804(g).

[17] In an appeal to the Appellate Division from a decision of the Appeal Board, Section 298 of the N.Y. Human Rights Law, N.Y. EXEC. LAW §298 (McKinney 1972), provides, *inter alia*, that:

> Any complainant, respondent or other person aggrieved by any order of the board may obtain judicial review thereof, and the division may obtain an order of court for its enforcement and for the enforcement of any order of the commissioner which has not been appealed to the board, in a proceeding as provided in this section. Such proceeding shall be brought in the appellate division of the supreme court. . . .

[18] An Article 78 proceeding is New York's general procedure for review of administrative and judicial actions and encompasses requests for relief formerly obtained by writs of certiorari, mandamus and prohibition. (N.Y. CIV. PRAC. LAW §7801)

it finds that the investigation was procedurally inadequate or that specified evidence should have been adduced, but was not. *E.g., Wolchok* v. *New York State Human Rights Appeal Board*, ___ A.D.2d ___, 441 N.Y.S.2d 746 (1981); N.Y. Exec. Law §298. An order of the Appellate Division, however, unless appealed to the New York Court of Appeals, is final and binding and constitutes a "judgment . . . determining the rights of the parties" under N.Y. Exec. Law §298 and N.Y. Civ. Prac. Law §411 (McKinney 1972).[19]

Before the Appellate Division, petitioner argued that Chemico had discriminated against him, that the proceedings before the NYHRD had not afforded him an adequate and procedurally fair hearing, and that specified evidence had not been adduced. (J.A. 23-4; S.A. 51—57).

The issues were briefed before the Appellate Division by both parties and the full certified record of the administrative proceedings before the NYHRD and the Appeal Board was submitted to the Appellate Division by the NYHRD's General Counsel.[20] (See S.A. 31) On February 27, 1978, following review of all of the parties' submissions and of the certified record of the proceedings below, the five-member court unanimously ordered that "the determination of the respondent, the State Human Rights Appeal Board be, and the same hereby is, confirmed. . . ". (J.A. 25) Petitioner did not seek to appeal the order of the Appellate Division to the New York Court of Appeals, although he was entitled to do so by section 298 of the Human Rights Law.

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[19] N.Y. EXEC. LAW §298 provides, *inter alia*, that

> [t]he jurisdiction of the appellate division of the supreme court shall be exclusive and its judgment and order shall be final, subject to review by the court of appeals in the same manner and form and with the same effect as provided for appeals from a judgment in a special proceeding.

N.Y. CIV. PRAC. LAW §411 provides: "The court shall direct that a judgment be entered determining the rights of the parties to the special proceeding."

[20] For a discussion of the role of the NYHRD's attorneys in proceedings before the Appeal Board and the Appellate Division see *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 68–70 (1980).

F. Petitioner's Final Proceedings Before the EEOC

Shortly after the Appellate Division affirmed dismissal of petitioner's state proceeding, the EEOC rendered its determination. On May 11, 1978, after reviewing the full record of all the prior proceedings, it found that "[t]here is not reasonable cause to believe that the charge is true" and issued petitioner a "right to sue letter". (J.A. 27) Petitioner then filed a request for reconsideration. On June 27, 1978 the EEOC denied that request in a letter of the District Director which indicated that he had personally reviewed the case file, had spoken at length with the investigator, particularly as to the points complained of by petitioner, and had concluded that the determination of no probable cause was appropriate and correct in all respects. (S.A. 49) Mr. Kremer then commenced this action in the District Court. Annexed to his complaint (J.A. 36) were copies of portions of the record compiled in his prior administrative and judicial proceedings.

SUMMARY OF ARGUMENT

Although required to do so neither by Title VII nor by New York's Human Rights Law, petitioner appealed to the Appellate Division from the NYHRD's dismissal of his complaint. The Appellate Division's resulting affirmance was a final judgment on the merits—binding under state law—and, therefore, entitled to full faith and credit so as to bar petitioner's subsequently instituted Title VII action in federal court. 28 U.S.C. § 1738 (1976); *Allen* v. *McCurry*, 449 U.S. 90, 96 (1980).

The appellate review obtained by petitioner from New York's second highest court is a guarantee that the NYHRD's determination to dismiss his complaint was arrived at in a procedurally fair manner. Were there any basis to his claim that the NYHRD acted arbitrarily and in an unfair and perfunctory manner, the Appellate Division was fully empowered—and obligated under the laws and constitutions of New York and of the United States—to correct those alleged defects. That the Appellate Division, which regularly exercises its power to police agency determinations in favor of complainants situated similarly to petitioner, found no defects in the NYHRD's procedure can only mean that Mr. Kremer was afforded a full and fair opportunity to be heard before the agency dismissed his complaint. To refuse to accord binding effect to the Appellate Division's judgment would be to hold that New York's

courts are presumed to be unable or unwilling to ensure the fundamental fairness of the procedures employed by the agencies whose actions they are charged with reviewing. This Court has repeatedly declined to indulge any such presumption. *Trainor* v. *Hernandez*, 431 U.S. 434, 444 (1977); *Juidice* v. *Vail*, 430 U.S. 327, 334 (1977); *Stone* v. *Powell*, 428 U.S. 465, 493-94 n. 35 (1976); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 611 (1975).

Nor do Title VII's "unique" enforcement scheme and "high priority" work an implied repeal of 28 U.S.C. §1738, enacted by the first Congress in 1790, or of principles of repose and comity which have long been recognized by Congress and this Court. *Allen* v. *McCurry*, *supra*, establishes that, despite their unquestionably extraordinary importance, the Reconstruction Era civil rights statutes do not impliedly derogate from the binding nature of a state court's judgment. There is nothing in Title VII's wording or legislative history to suggest a different result in this case. Indeed, unlike 42 U.S.C. § 1983 (1976), Title VII was *not* enacted because of the perceived hostility of state officials and courts to the vindication of federal rights. Rather, Title VII, in requiring a limited deferral to existing state administrative remedies, bespeaks a confidence in state procedures which is wholly compatible with those notions of comity and federalism which are embedded in 28 U.S.C. § 1738.

Finally, sound public policy mandates that state court review of state agency determinations be accorded binding effect by federal courts. A contrary result would only demoralize and render ineffective state systems which, as contemplated by Title VII, work in tandem with existing federal forums to eliminate invidious employment discrimination.

ARGUMENT

Principles of Preclusion and Federalism Bar Relitigation in a Federal Court, Under Title VII, of a Claim of Employment Discrimination Adversely Disposed of by a Final State Court Judgment.

INTRODUCTION

Petitioner Rubin Kremer's charge of discrimination was dismissed for lack of probable cause by the NYHRD. After unsuc-

cessfully pursuing an administrative appeal to the Appeal Board, petitioner made a critical choice: he elected to press an appeal to the Appellate Division of the Supreme Court—New York's second highest court. The Appellate Division's resulting affirmance of the agency's action was a final judgment, on the merits, entitled to binding effect under New York law. N.Y. Exec. Law §298; N.Y. Civ. Prac. Law §411; *see: Reilly* v. *Reid*, 45 N.Y.2d 24, 27, 379 N.E. 2d 172, 407 N.Y.S.2d 645, 646 (1978); *Mitchell, supra*, 553 F.2d at 273; *Taylor* v. *New York City Transit Authority*, 433 F.2d 665, 668 (2d Cir. 1970).

By operation of common law and 28 U.S.C. §1738, that state court judgment was entitled to be accorded preclusive effect by the federal courts.[21] *Allen* v. *McCurry, supra*, 449 U.S. at 96. Accordingly, both the District Court and the Second Circuit correctly held that Mr. Kremer's Title VII action was barred by virtue of the Appellate Division judgment.[22] In so doing, the courts below not only heeded conventional res judicata concerns (the need for repose and finality, the avoidance of repetitious litigation, and the prevention of inconsistent results, thereby fostering reliance on adjudication), but also "promote[d] the comity between state and federal courts that has been recog-

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[21] 28 U.S.C. §1738 (1976) provides in pertinent part:

> The records and judicial proceedings of any court of any . . . State, Territory or Possession . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

[22] The Second Circuit based its affirmance squarely upon *Sinicropi, supra*, which it declined to reconsider. *Sinicropi* was based upon *Mitchell, supra*, which held that a determination of the NYHRD, after an investigation but without a hearing, finding no probable cause was, if appealed to the New York state courts, entitled to res judicata effect so as to bar a subsequent federal suit under 42 U.S.C. §1981.

In *Mitchell* the Second Circuit carefully analyzed the fairness of New York's administrative scheme and found that the dismissal of a complaint by the NYHRD meant that, as a matter of law, the complaint was devoid of merit. This, the Second Circuit reasoned, offered a complainant protection comparable to that afforded a federal court litigant under Rules 12(b) and 56 of the Federal Rules of Civil Procedure. 553 F.2d at 270-71. Moreover, review by the Appellate Division ensured that the NYHRD had proceeded fairly in dismissing complaints. *Id.* at 272 n. 9.

nized as a bulwark of the federal system". *Allen* v. *McCurry*, *supra*, 449 U.S. at 96.

Petitioner contends that, because Title VII suits are entitled to the "highest priority" (Pet. Brief at 7), this Court should fashion an exception to the rule—which has been the law since the first Congress met in 1790—that federal courts normally are required to accord preclusive effect to state court judgments. *See* 28 U.S.C. §1738. Petitioner advances three arguments in support of his contention that he was entitled to a de novo adjudication in a federal court of the employment discrimination claim which was rejected by New York's agencies and appellate court. First, petitioner complains that, because the New York judgment was arrived at in a "perfunctory", unfair manner, it is not entitled to the deference normally accorded state court judicial proceedings by federal courts. Second, petitioner claims that it is a policy of Title VII to guarantee each claimant a de novo factfinding by a federal court and that this policy is strong enough implicitly to override the considerations of repose, comity, and federalism which would otherwise interdict the relitigation in a federal forum of a claim turned down by a state court. Third, mindful of the overweaning importance of the interests served by the preclusion doctrine, petitioner contends that denying binding effect to the Appellate Division's judgment would actually enhance, rather than derogate from, principles of comity and federalism.

These contentions will be discussed *seriatim*.

I. Appellate Division Review of the Administrative Disposition of Employment Discrimination Claims Guarantees the Fairness of the State Procedure

Res judicata is properly invoked whenever a party seeks to relitigate a claim which has previously been decided against him by a court of competent jurisdiction. *Federated Department Stores, Inc.* v. *Moitie*, ___ U.S. ___, 101 S.Ct. 2424, 2427 (1981); *Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1948); *Cromwell* v. *County of Sac*, 94 U.S. 351, 352-53 (1877). Similarly, collateral estoppel precludes relitigation, by the same party, of issues previously decided against him, provided that he had a "full and

fair opportunity" to litigate those issues in the earlier adjudication. *Cf., Montana* v. *United States*, 440 U.S. 147, 153 (1979).

Petitioner asserts that he "had no opportunity at all to raise the issue of Chemico's discriminatory conduct in state court." (Pet. Brief, p. 11). This assertion is entirely incorrect, since in affirming the NYHRD's dismissal of petitioner's complaint the Appellate Division necessarily decided that petitioner had not been denied any of the procedural rights to which he was entitled, and that his "complaint lacks merit as a matter of law."[23] And, of course, judicial affirmance of an administrative determination is entitled to preclusive effect be it as a matter of res judicata or collateral estoppel. *See: CIBA Corp.* v. *Weinberger*, 412 U.S. 640, 644 (1973); *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 476 (1952); *International Union of Mine, Mill & Smelter Workers* v. *Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 339 (1945); *Grubb* v. *Public Utilities Comm'n of Ohio*, 281 U.S. 470, 475 (1930); *Napa Valley Electric Co.* v. *Board of Railroad Com'rs*, 251 U.S. 366, 370-72 (1920); *In re Federal Water & Gas Corp.*, 188 F.2d 100, 104 (3d Cir.), *cert. denied*, 341 U.S. 953 (1951).[24]

Compelled to acknowledge the identity of the parties to and issues raised in the state and federal proceedings (Pet. Brief, p.

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[23] *See, Flah's Inc.* v. *Schneider*, 71 A.D.2d 993, 420 N.Y.S.2d 283, 284 (1979), and *post* pp. 18 to 25; *cf. Angel* v. *Bullington*, 330 U.S. 183, 190 (1947) ("The 'merits' of a claim are disposed of when it is refused enforcement.").

[24] It is asserted at page 19, n. 20 of the Government's brief that only collateral estoppel and not claim preclusion can apply here because, according to the Government, petitioner's Title VII claim was not and could not have been before the NYHRD. While the distinction is important in other contexts, it is of no practical significance in this case: dismissal of petitioner's Title VII suit must be affirmed, whether his discrimination claim is precluded by the Appellate Division's judgment, or whether he is collaterally estopped by that judgment from complaining that Chemico had discriminated against him. But while it is academic here (as the Government's footnote treatment appears to recognize), we think that the Government is wrong both in principle and in its assumption that the state courts could not consider a Title VII claim as such. As one court has recently said, citing *Mitchell, supra*, with approval:

> Under established precedent, the identity of two actions, as intimately tied together as these two, will not be destroyed in the res judicata context simply because the two suits are based on different statutes. . . . Nor will the rule be any different because a

14, n. 12), petitioner seeks to avoid the preclusive effect of the

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> state statute is the authority for one action and a federal statute for the other, when the two statutes afford the same right or interdict the same wrong. . . .

Nash C'ty Bd. of Educ. v. *Biltmore Co.*, 640 F.2d 484, 488 (4th Cir.), *cert. denied*, 50 U.S.L.W. 3250 (October 5, 1981). *See also, e.g., Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316, 321 (1927), stating the test to be whether there is "a violation of but one right by a single legal wrong". Here the right which petitioner has sought to vindicate in both the state and federal proceedings is the right to be free from discrimination in his employment relationship and the alleged wrong is a denial of that right. Moreover, the result is the same whether or not the federal courts have exclusive jurisdiction over the federal cause of action, at least where the federal plaintiff is not compelled to assert it in the state proceedings. *Becher* v. *Contoure Laboratories*, 279 U.S. 388 (1929, Holmes, J.) and *Nash C'ty Bd. of Educ.* v. *Biltmore Co.*, *supra*, 640 F.2d at 488-93.

We must also take exception to the Government's assertion that the federal court's jurisdiction over Title VII claims is exclusive simply because the Government so "explained" in a brief filed last term in a case having nothing to do with res judicata (*see* Government Brief n. 20). As this Court recently reiterated:

> In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction. See *California* v. *Arizona*, 440 U.S. 59, 66-67 (1979); *Dowd Box Co.* v. *Courtney*, [368 U.S. 502, 507-508 (1961)]. Congress, however, may confine jurisdiction to the federal courts either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.

Gulf Offshore Co. v. *Mobil Oil Corp.*, ___ U.S. ___, 101 S.Ct. 2870, 2875 (1981). There is no inconsistency between achieving the objectives of Title VII and concurrent state court jurisdiction since, as was also pointed out in *Gulf Offshore Co.*:

> Exclusive federal court jurisdiction over a cause of action generally is unnecessary to protect the parties. The plaintiff may choose the available forum he prefers, and the defendant may remove the case if it could have been brought originally in a federal court. 28 U.S.C. § 1441(b).

Id. at 101 S.Ct. 2878 n. 12.

So too, both 43 U.S.C. § 1333(b) (now 43 U.S.C. § 1349(b)) which was involved in *Gulf Offshore*, and section 706(f)(3) of Title VII provide that the federal court "shall have jurisdiction". Title VII also parallels § 301(a) of the Labor-Management Relations Act as to which concurrent jurisdiction was sustained in *Dowd Box Co.*, *supra*, since both were enacted because of a congressional concern that many states would not provide a remedy for the perceived wrong. Compare 368 U.S. at 509-512 with the discussion of Title VII's legislative history at *post*, pp. 29 to 37.

state court judgment by calling into question the fairness of the state procedures.

To assess petitioner's attack on the disposition of his claim by New York's administrative and judicial systems, it is necessary first to understand the manner in which those systems function. A claim of employment discrimination, lodged with the NYHRD pursuant to section 297 of the Human Rights Law, N.Y. Exec. Law §297(1) (McKinney 1972), requires the NYHRD to conduct a "prompt investigation" of the complaint to determine "whether there is probable cause to believe that the person named in the complaint . . . has engaged or is engaging in an unlawful discriminatory practice." N.Y. Exec. Law §297(2). Before this determination as to probable cause can be made, the complainant is entitled to a "full opportunity to present on the record, though informally, his charges against his employer or other respondent, including the right to submit all exhibits which he wishes to present and testimony of witnesses in addition to his own testimony".[25] *State Division of Human Rights ex rel. Speller* v. *New York State Drug Abuse Control Commission*, 59 A.D.2d 332, 336, 399 N.Y.S.2d 541, 544 (1977). Before the probable cause determination may be made, the complainant must be afforded the opportunity to rebut any evidence which has been submitted by the respondent (Rules of Practice and Procedure of the Division of Human Rights, 9 N.Y. C.R.R. 465.6 (1977) reprinted at S.A. 64), and may be accorded the opportunity directly to confront a representative of the respondent at a "confrontation conference". Rules of Practice and Procedure of the Division of Human Rights, 9 N.Y.C.R.R. 465.6, reprinted at S.A. 64. *See Taber* v. *New York State Human Rights Appeal Board*, 64 A.D.2d 990, 991, 408 N.Y.S.2d 826, 827-28 (1978).[26]

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[25] Although entitled to the assistance of counsel throughout, a *pro se* complainant has the right to cause the NYHRD to issue subpoenas compelling the attendance of witnesses and the production of documents on his behalf. Rules of Practice and Procedure of the Division of Human Rights, 9 N.Y.C. R.R. 465.12, reprinted at S.A. 64.

[26] A confrontation conference need not be held provided that the complainant "has otherwise been given a full opportunity to present his case and rebut

If the investigation preceding the determination of probable cause is unduly abbreviated or one-sided, the NYHRD's finding of no probable cause will be overturned on appeal by the Appellate Division as having been arbitrary and capricious. *Gregory* v. *New York State Human Rights Appeal Board*, 64 A.D.2d 775, 776, 407 N.Y.S.2d 256 (1978); *Tenenbaum* v. *State Division of Human Rights*, 50 A.D.2d 257, 259, 376 N.Y.S.2d 542, 544 (1975).

If the investigation discloses probable cause and efforts at conciliation fail, the NYHRD must conduct a public hearing to determine the merits of the complaint. N.Y. Exec. Law §297(4)(a) (McKinney 1972); *Mayo* v. *Hopeman Lumber & Manufacturing Co.*, 33 A.D.2d 310, 307 N.Y.S.2d 691 (1970). In determining whether a complainant is entitled to a hearing, the NYHRD must give "full credence . . . to the complainant's version of the events". *State Division of Human Rights* v. *Buffalo Glass Co.*, 42 A.D.2d 678, 344 N.Y.S.2d 374, 375 (1973); *accord*, *State Division of Human Rights* v. *Xerox Corp.*, 49 A.D.2d 21, 23, 370 N.Y.S.2d 962 (1975), *aff'd*, 39 N.Y.2d 873, 352 N.E.2d 139, 386 N.Y.S.2d 221 (1976). It is only where the documentary and testimonial evidence adduced by the complainant in support of his complaint and in rebuttal of the respondent's response fails, as a matter of law, to reveal any

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evidence submitted by respondent". *Taber* v. *New York State Human Rights Appeal Bd.*, *supra*, 64 A.D.2d at 991, 408 N.Y.S.2d at 828.

Although a confrontation conference is not invariably required, when one is held, it must provide "a full and complete opportunity to confront and rebut the respondent employer's answer". *Wolchok* v. *New York State Human Rights Appeal Board*, ___ A.D.2d ___, 441 N.Y.S.2d 746, 747 (1981). If the confrontation conference has been unduly foreshortened, a finding of no probable cause will be reversed by the Appellate Division. *Id.* For other decisions overturning findings of no probable cause as capricious due to the one-sidedness of the underlying investigation or the failure to hold a confrontation conference or to examine witnesses crucial to a complainant's case, *see Alttery* v. *State Div. of Human Rights*, 61 A.D.2d 780, 402 N.Y.S.2d 405 (1978); *Papeskov* v. *State Div. of Human Rights*, 60 A.D.2d 545, 400 N.Y.S.2d 65 (1977); *Long Island R.R.* v. *New York State Human Rights Appeal Bd.*, 39 A.D.2d 924, 399 N.Y.S.2d 259 (1977); *Clarke* v. *T.V.C. Lab, Inc.* 54 A.D.2d 675, 387 N.Y.S.2d 849 (1976); *State Div. of Human Rights* v. *Mecca Kendall Corp.*, 53 A.D.2d 201, 385 N.Y.S.2d 665 (1976); *State Div. of Human Rights* v. *Board of Educ., Olean Pub. Schools*, 46 A.D.2d 483, 363 N.Y.S.2d 370 (1975).

merit to the complaint that the NYHRD may, without holding a public hearing, make a finding of no probable cause. *Flah's Inc.* v. *Schneider*, 71 A.D.2d 993, 420 N.Y.S.2d 283, 284 (1979); *State Division of Human Rights* v. *Genesee Brewing Co.*, 67 A.D.2d 1078, 415 N.Y.S.2d 134, 135 (1979); *Stasiak* v. *Montgomery Ward & Co.*, 66 A.D.2d 962, 411 N.Y.S.2d 700, 701 (1978); *Glen Cove Public Schools* v. *New York State Human Rights Appeal Board*, 58 A.D.2d 591, 592, 395 N.Y.S.2d 493, 494 (1977); *Rodriguez-Abad* v. *Hurst*, 49 A.D.2d 115, 373 N.Y.S.2d 583 (1975); *Mayo* v. *Hopeman Lumber & Manufacturing Co., supra*, 33 A.D.2d at 313, 307 N.Y.S.2d at 695 (1970);[27] *Cf. State Division of Human Rights* v. *Bond, Schoeneck & King*, 52 A.D.2d 1045, 1046, 384 N.Y.S.2d 568, 569 (1976); *Pember* v. *New York State Division of Human Rights*, 50 A.D.2d 903, 377 N.Y.S.2d 554 (1975).

A complainant may appeal the dismissal of his complaint by the NYHRD to the Appeal Board, an adjudicatory administrative

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[27] *Mitchell, supra*, 553 F.2d at 770-71, relied upon *Mayo* v. *Hopeman Lumber & Mfg. Co., supra*, for the proposition that the dismissal of a complaint without a hearing is justified only where it appears "virtually that as a matter of law the complaint lacks merit". The Government's brief argues, at 15-16 n. 15, that a subsequent Appellate Division opinion (*State Div. of Human Rights ex rel. Speller* v. *New York State Drug Abuse Control Comm., supra*) "retreated" from *Mayo's* "broad sweep" and made it "clear that factual disputes may be resolved adversely to the complainant without holding a hearing". This is simply untrue.

First, *Speller* itself stated: "*We do not retreat from our holding in* Mayo". 59 A.D.2d at 337, 399 N.Y.S.2d at 544 (emphasis added).

Second, it is clear that, in stating that questions of fact could be resolved by the NYHRD, the *Speller* court was referring, in dictum, to the "ultimate determination of the merits of the complaint" *after* a public hearing had been held. *Id.* Where, as here, there has been no hearing, the finding of probable cause—to be rational and sustainable—must be based on the complaint's lack of legal merit. Cases subsequent to *Speller* have so held. *E.g., Flah's Inc.* v. *Schneider, supra*, 71 A.D.2d at 993, 420 N.Y.S.2d at 284 ("The record does not indicate that there was a thorough inquiry during which the complainant was afforded a full opportunity to present her contentions. In addition, it does not appear that the complaint lacks merit as a matter of law. Therefore, the complaint should not have been dismissed. . . ." [citing both *Speller* and *Mayo*]); *State Div. of Human Rights* v. *Genesee Brewing Co., supra*, 67 A.D.2d at 1078, 415 N.Y.S.2d at 135; *Stasiak* v. *Montgomery Ward & Co., supra*, 66 A.D.2d at 962, 411 N.Y.S.2d at 701.

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body separately constituted from and independent of the NYHRD. *See, Mitchell, supra,* 553 F.2d at 267 n. 4. If there has been a hearing, the Appeal Board's review of the dismissal ascertains whether it is "supported by substantial evidence on the whole record". N.Y. Exec. Law §297-a(7)(d) (McKinney 1972). Where, as here, there has been no hearing, the finding of no probable cause will be upheld if "not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion". *Id.*, §297-a(7)(e). In addition, the Appeal Board is empowered to review the NYHRD's dismissal to ensure that it is "in conformity with the constitution and the laws of the state and the United States". *Id.*, §297-a(7)(a).

Appeals may—but need not—be taken from the Appeal Board to the Appellate Division pursuant to section 298 of the Human Rights Law. This procedure, created specially for enforcement

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When the NYHRD's finding of no probable cause is reviewed, it is measured either by a "substantial evidence on the whole record" standard (N.Y. EXEC. LAW §297-a(7)(d)) or by a "not arbitrary, capricious" standard. *Id;* §297-a(7)(e). The "substantial evidence" standard, which mandates deference to the NYHRD's resolution of factual issues, is employed where there has been a public hearing. The "arbitrary and capricious" standard is employed where there has been no hearing and permits dismissal only where there has been no evidence to support the complaint. *Mayo* v. *Hopeman Lumber & Manufacturing Co., supra,* 33 A.D.2d at 313, 307 N.Y.S.2d at 695; *cf., State Div. of Human Rights* v. *Univ. of Rochester School of Medicine & Dentistry,* 72 A.D.2d 941, 942, 422 N.Y.S.2d 224, 225-26 (1979); *see also, Division of Human Rights* v. *Regional Transit Serv.,* 79 A.D.2d 1106, 435 N.Y.S.2d 856, 857 (1981). The dictum in *Speller* concerning the NYHRD's authority to resolve factual disputes pertained to the situation in which there has been a hearing and in which dismissal will be upheld if supported by substantial evidence. In the instant case, petitioner had no hearing, and the requirement of *Mayo* that the complaint lack merit "virtually as a matter of law" applied.

Since it is not limited to the record, the scope of judicial review under the "arbitrary and capricious" test is broader than under the "substantial evidence" test and permits the Appellate Division, where the record appears incomplete, itself to designate a referee or trial term judge to conduct a de novo hearing. *See* D. Gabrielli (Associate Judge of the New York Court of Appeals) and J. Nonna, *Judicial Review of Administrative Action in New York: An Overview and Survey,* 52 ST. JOHN'S L.REV. 361, 371 n. 44 (1978); *Mandle* v. *Brown,* 5 N.Y.2d 51, 152 N.E.2d 511, 177 N.Y.S.2d 482 (1958); *In re Caristo Constr. Corp.,* 30 Misc.2d 185, 221 N.Y.S.2d 956 (Sup. Ct. 1961), *modified sub nom. Caristo Constr. Corp.* v. *Rubin,* 15 A.D.2d 566, 222 N.Y.S.2d 998 (1961), *aff'd,* 10 N.Y.2d 538, 180 N.E.2d 794, 225 N.Y.S.2d 502 (1962).

of the Human Rights Law, mandates that appeals be determined "as expeditiously as possible and with lawful precedence over other matters" N.Y. Exec. Law §298.[28] There is no requirement in section 298 that complainants also invoke the provisions of Article 78, N.Y. Civ. Prac. Law, as did petitioner.[29] *Cf.*, 8 J. Weinstein, H. Korn and A. Miller, *New York Civil Practice Law* ¶ 7801.02, pp. 78-5–78-6 (1980).

In reviewing the determination of the Appeal Board, the Appellate Division has jurisdiction of the proceeding and of all the questions determined therein,[30] and has the power to

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[28] The provision for expedited appeals, like the availability of interlocutory judicial appeals from non-final orders of the NYHRD and Appeal Board, exists by virtue of the Human Rights Law's "unmistakably remedial intent to combat the pernicious effects of discrimination". *State Office of Drug Abuse Serv.* v. *State Human Rights Appeal Bd.*, 48 N.Y.2d 276, 282-83, 422 N.Y.S.2d 647, 650 (1979). *See also, Gramatan Ave. Assoc.* v. *State Div. of Human Rights*, 45 N.Y.2d 176, 378 N.E.2d 183, 408 N.Y.S.2d 54, 56-57 (1978) (declaring that state policy of eradicating discrimination requires that Human Rights Law "be construed liberally for the accomplishment of the purposes thereof").

[29] Article 78 provides for special proceedings, in the nature of the common law writs of mandamus, certiorari, and prohibition, to test the actions of state agencies or officials. Article 78 provides, *inter alia*, for review according to an "arbitrary and capricious" standard. N.Y. CIV. PRAC. LAW §7803(3). If there has been a hearing, the standard of review is a "substantial evidence" test. *Id.* §7803(4). In addition, an agency's adjudicatory procedure can be challenged—under Article 78—for having been applied in violation of federal constitutional standards of due process. D. Gabrielli and J. Nonna, *Judicial Review of Adminstrative Action in New York: An Overview and Survey*, 52 ST. JOHN'S L. REV. 361, 375-76 (1978); *Hammer* v. *Town of Greenburgh*, 440 F.Supp. 27, 29 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1368 (2d Cir. 1978); *303 West 42nd St. Corp.* v. *Klein*, 46 N.Y.2d 686, 693, 389 N.E.2d 815, 416 N.Y.S.2d 219, 223 (1979); *Overhill Building Co.* v. *Delany*, 28 N.Y.2d 449, 456, 458, 322 N.Y.S.2d 696, 701, 703 (1971); *Tischler* v. *Board of Educ.*, 37 A.D.2d 261, 323 N.Y.S.2d 508 (1971); *Anderson* v. *Board of Educ.*, 77 Misc.2d 904, 354 N.Y.S.2d 521, 526-27 (Sup. Ct. 1974), *rev'd on other grounds*, 46 A.D. 360, 362 N.Y.S.2d 536 (1974), *aff'd* 38 N.Y.2d 897, 346 N.E.2d 551, 382 N.Y.S.2d 750 (1976); *Comparato* v. *Knauf*, 61 Misc. 2d 245 248, 305 N.Y.S.2d 640, 644 (Sup. Ct. 1969); *cf., Board of Regents* v. *Tomanio*, 446 U.S. 478, 491-92 n. 9 (1980).

[30] Necessarily, the Appellate Division has jurisdiction to review the Appeal Board's determination, pursuant to N.Y. EXEC. LAW §297-a(7)(a), that the NYHRD's order has been reached "in conformity with the constitution and the laws of the state and the United States." Accordingly, a claim that the NYHRD failed to accord procedural due process to a complainant would be cognizable by the Appellate Division.

enforce, modify or set aside in whole or in part any order of the NYHRD or Appeal Board. N.Y. Exec. Law §298.[31]

The Appellate Division's judgment is final, subject to review by the New York Court of Appeals. N.Y. Exec Law §298. *Cf.*, N.Y. Civ. Prac. Law, §411.

Petitioner's claim, in this Court, that he was not accorded a "full and fair" opportunity to be heard at the NYHRD level is a reiteration of the claim—advanced by him before the Appeal Board and the Appellate Division—that the NYHRD's procedures were unfair. The procedural infirmities supposedly inhering in the NYHRD's investigation and determination are that petitioner was unassisted by counsel; that he was denied the right to call any of the witnesses he "repeatedly identified"; that there were no Chemico witnesses for him to confront; that he was not afforded any discovery; and that there was no formal, adversarial hearing at which a record was made. Pet. Brief, p. 4.

By focusing on the claimed procedural shortcomings in his particular case, petitioner loses sight of the fact that the critical inquiry pertains to the adequacy of the procedural rights which were *available*, whether or not they were exercised. Holding that principles of federalism and comity barred a challenge under 42 U.S.C. §1983 to the constitutionality of certain state court contempt proceedings, this Court explained, in *Judice* v. *Vail*, 430 U.S. 327, 337 (1977), that:

> Here it is abundantly clear that appellees had an *opportunity* to present their federal claims in the state proceedings. No more is required to invoke *Younger* abstention. There is no support . . . for the District Court's belief that the state courts must have an *actual* hearing . . . in order for *Younger* and *Huffman* to apply. Appellees need be accorded only an opportunity to fairly pursue their constitutional claims in the

[31] On occasion, the Appellate Division—in reviewing a finding of no probable cause—has gone further and, rather than merely remitting the matter to the NYHRD, has granted the complainant the relief sought: back pay with interest. *E.g.*, *Phoebe* v. *State Div. of Human Rights*, 70 A.D.2d 862, 418 N.Y.S.2d 55 (1979).

> ongoing state proceedings, [citation omitted] and their failure to avail themselves of such opportunities does not mean that the state procedures were inadequate.

(Emphasis in original; footnotes omitted); *see*, *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 163-69 (1932).

Thus, while petitioner complains of his lack of legal representation before the NYHRD, the fact remains that he was entitled—but declined—to appear with counsel. Although petitioner was likewise free to proceed *pro se*, it is anomalous for him now to argue that his decision to dispense with counsel constitutes a procedural infirmity in the structure of New York's Human Rights Law. Such an argument, seeking to gain an advantage from his failure to appear with counsel, is particularly inappropriate given that it is one of the purposes of Title VII —by permitting the award of attorney's fees to the prevailing party (42 U.S.C. § 2000e-5(k))—to encourage legal representation, even at the state administrative level. *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 63 (1980); *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978).

Similarly, the NYHRD's alleged failure to hear the witnesses petitioner "repeatedly identified" (Pet. Brief at 4) represents a default by petitioner rather than a structural defect in the NYHRD's procedures. Mr. Kremer neglects to mention that he first "identified" his potential witnesses when he sought review, by the Appeal Board, of the NYHRD's dismissal of his claim. (*See* S.A. 11, 12) Having failed to provide any list of witnesses to the NYHRD, petitioner should not be heard to complain that the NYHRD failed to call witnesses only *subsequently* identified by petitioner. Moreover, because he was appearing *pro se*, petitioner had the right to request the NYHRD to issue subpoenas compelling the attendance of witnesses and the production of documents on his behalf. *See* Rules of Practice and Procedure of the Division of Human Rights, 9 NYCRR 465.10 (1975); *Mitchell*, *supra*, 553 F.2d at 271 n. 7. That petitioner failed to take advantage of this opportunity hardly warrants the conclusion that the NYHRD's procedures were so flawed as to

be unworthy of deference by a federal court. *Cf. Juidice* v. *Vail, supra,* 430 U.S. at 337.

Petitioner complains that the NYHRD's investigation was devoid of the formalities which characterize a plenary Title VII suit in a federal court. Implicitly, petitioner is arguing that, for the judgment of a state court affirming the determination of a state agency to be entitled to full faith and credit pursuant to 28 U.S.C. §1738, the underlying procedures of the agency must not only be "full and fair", they must actually replicate those found in a United States District Court.

Notably, however, the definition of what constitutes a full and fair procedure depends entirely upon the type of adjudication which is involved. There is no simple, rigidly fixed, model of procedural fairness universally applicable to all proceedings. In discussing the flexible nature of procedural fairness, this Court has made it abundantly clear that the process which is "due" varies with the nature of the process. Thus, in *Mitchell* v. *W. T. Grant* Co., 416 U.S. 600, 610 (1974), this Court stated:

> The requirements of due process of law "are not technical, nor is any particular form of procedure necessary." *Inland Empire Council* v. *Millis*, 325 U.S. 697, 710 (1945). Due process of law guarantees "no particular form of procedure; it protects substantial rights." *NLRB* v. *Mackay Co.*, 304 U.S. 333, 351 (1938). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961); *Stanley* v. *Illinois*, 405 U.S. 645, 650 (1972).

In the case of New York's anti-discrimination statute, the New York legislature has made a judgment that the fundamental fairness of the NYHRD's procedures can best be ensured by permitting those aggrieved by its determinations to argue—on appeal to the Appeal Board and the Appellate Division—that a determination has been arrived at in violation of the New York or United States constitutions. N.Y. Exec. Law §§297-a(7)(a) & 298.

A refusal to accord full faith and credit to the Appellate Division's judgment, on the grounds that procedures followed in a federal court were not utilized, would negate the expressed will of the New York legislature, would trivialize the role of the Appellate Division in ensuring the fundamental fairness of the administrative proceedings which it is charged with reviewing, and would impugn the ability and willingness of New York's courts to afford litigants basic procedural due process. This Court, however, has emphatically refused to assume any such incompetence or recalcitrance on the part of the state judiciaries. *Trainor* v. *Hernandez*, *supra*, 431 U.S. at 443; *Stone* v. *Powell*, *supra*, 428 U.S. at 493-94 n. 35 (1976); *Schlesinger* v. *Councilman*, 420 U.S. 738, 755-56 (1975);[32] *cf.*, *Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 507-08 (1962).

With respect to petitioner's claims that he was improperly denied the right to confront representatives of Chemico or to have a decision rendered on the basis of a formal record made at a full-fledged adversarial hearing, it is noteworthy that other complainants—situated similarly to petitioner—have often been able successfully to persuade the Appellate Division that administrative determinations of no probable cause were procedurally unfair for each of those reasons.[33]

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[32] As the Court stated in *Huffman* v. *Pursue, Ltd.*, *supra*, 420 U.S. at 611 (1975): "Yet, Art. VI of the United States Constitution declares that 'the Judges in every state shall be bound' by the Federal Constitution, laws, and treaties. Appellee is in truth urging us to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities. This we refuse to do." Petitioner in this case is, likewise, asking this Court to fashion an exception to 28 U.S.C. §1738 on the assumption that appeals—like Mr. Kremer's own appeal—raising claims as to the lack of fundamental fairness of the state administrative procedure will be automatically and summarily rejected by New York's appellate courts.

[33] *E.g.*, *Wolchok* v. *New York State Human Rights Appeal Board*, ___ A.D.2d ___, 441 N.Y.S.2d at 747 (1981); *Perez* v. *New York State Human Rights Appeal Board*, 70 A.D.2d 558, 416 N.Y.S.2d 813 (1979); *Belgrave* v. *New York State Division of Human Rights*, 68 A.D.2d 922, 414 N.Y.S.2d 377 (1979); *Gregory* v. *New York State Human Rights Appeal Board*, 64 A.D.2d 775, 407 N.Y.S.2d 256 (1978); *State Division of Human Rights* v. *Mecca Kendall Corp.*, 53 A.D.2d 201, 385 N.Y.S.2d 665 (1976); *Burns* v. *Sabena Belgian World Airlines*, 42 A.D.2d 347, 347 N.Y.S.2d 958 (1973); *Mayo* v. *Hopeman Lumber & Manufacturing Co.*, *supra*, 33 A.D.2d 310, 307 N.Y.S.2d 691 (1970). *See also* authorities cited, *ante*, at n. 26.

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Where, on the other hand, the record before the NYHRD discloses no factual issue relating to the claim of employment discrimination and it appears as a matter of law that the complaint lacks merit, the NYHRD's finding of no probable cause will be left undisturbed on appeal, notwithstanding the absence of a hearing or of an opportunity for the complainant to confront representatives of his employer. *State Division of Human Rights* v. *Bond, Schoeneck & King*, 52 A.D.2d at 1045, 384 N.Y.S.2d 568 (1976); *Mayo* v. *Hopeman Lumber & Manufacturing Co., supra*, 33 A.D.2d at 313, 307 N.Y.S.2d at 694; *cf., Mitchell, supra*, 553 F.2d at 272 n. 9.

Given the willingness of the New York courts to reverse and remand procedurally inadequate determinations of no probable cause, *see* n. 26, *ante*, it simply must be assumed that petitioner failed to persuade the Apellate Division that there was any legal basis to his claim. To indulge the contrary assumption—advocated by petitioner—that the Appellate Division automatically rubber-stamped the agency whose actions it was reviewing, is both to disregard the numerous cases reversing procedurally inadequate determinations by the NYHRD and to presume, contrary to a fundamental postulate of "Our Federalism", *Younger* v. *Harris*, 401 U.S. 37, 44-5 (1971), that state courts either cannot or will not enforce fundamental federal rights.[34]

Petitioner also complains of the allegedly hurried, truncated nature of his interview with the field representative. Notably, however, he claims to have had sufficient time at that interview to refute all of Chemico's defenses (S.A. 68). A claim that the pre-hearing investigation is too abbreviated is one which can be raised on appeal to the Appellate Division. *See, e.g., Wolchok* v. *New York State Human Rights Appeal Board, supra*, 441 N.Y.S.2d at 746. As to petitioner's remaining claim of procedural unfairness—the unavailability of discovery—suffice it to say that due process imposes no such requirement. *Wardius* v. *Oregon*, 412 U.S. 470, 475 (1973); *United States* v. *Augenblick*, 393 U.S. 348, 356 (1969).

At page 17, n. 14 of his Brief, petitioner quotes a brief passage from a recent Bar Association Report on the NYHRD and the Appeal Board, which, taken out of context, implies criticism of their procedures. A reading of this Report in its entirety reveals it to be a balanced, and not particularly critical, assessment of both agencies.

[34] The right to a procedurally fair administrative investigation is cognizable under the Fourteenth Amendment's due process clause. Due process violations can be raised under N.Y. EXEC. LAW §§297-a(7)(a) and 298 and can be, and

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Important values of repose and finality are undermined by collateral attacks upon the correctness of state court judgments. Once it is clear that a state judicial system reviewing administrative determinations offers the opportunity to challenge the procedural adequacy of those determinations, collateral attack in federal court upon that system's judgments endangers those values of repose and finality and compromises the independence of the state judiciary without offering any substantial prospect of enhanced ascertainment of the "Facts as They Really Are". Note, *Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments*, 87 Yale L.J. 164, 188-89 (1977).

II. Title VII, in Providing a Federal Forum to Supplement State Anti-Discrimination Efforts, Does Not Override Well-Established Principles of Repose and Comity, Which Require That Federal Courts Accord Preclusive Effect to Final State Court Judgments.

In addition to claiming that the state proceedings were unfair to him, Mr. Kremer argues that "[p]reclusion would undermine a Congressional plan to enforce a national policy 'of the highest order' " (Pet. Brief, p. 23) and would be incompatible with the "comprehensive enforcement scheme" of Title VII (Pet. Brief, p. 9, quoting *New York Gaslight Club* v. *Carey*, *supra*, 447 U.S. at 63.) Implicit, therefore, in his argument is a claim that by enacting Title VII Congress impliedly repealed section 1738.[35]

That, by creating a private federal cause of action under Title VII, Congress evidenced a national policy "of the highest order" is no basis for concluding that it intended to nullify the existing

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often are, raised in Article 78 proceedings. *See* n. 29, *ante*. Indeed, all of the inadequacies which petitioner now cites were raised—on his appeal to the Appellate Division—and are tantamount to a claim that his procedural due process rights were violated. Analytically, whether proceeding under an "arbitrary and capricious" or "abuse of discretion" standard, or under the terms of the Fourteenth Amendment, the Appellate Division's review of administrative actions is identical. To charge that court with mindlessly ratifying agency determinations is indistinguishable from labelling it unfit to safeguard federal due process rights.

[35] Petitioner made this claim *explicitly* in the brief he submitted to the Court of Appeals and in his Petition for Certiorari, at p.10 n.**.

federal statute which requires that state court judgments be accorded full faith and credit. The principle of finality enforced through section 1738 is itself "a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the court." *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U.S. 294, 299 (1917), quoted in *Federated Department Stores, Inc.* v. *Moitie, supra*, 101 S.Ct. at 2429.

The validity of a claim of implied repeal, moreover, does not call for judicial weighing of the relative strengths of the legislative policies behind the two provisions in question. It focuses instead upon the actual intent of Congress in passing the more recent provision. And because of the "cardinal rule" of statutory construction, *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936), that repeals by implication are disfavored,[36] "[t]he intention of the legislature to repeal must 'be clear and manifest.'" *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939), quoting *Red Rock* v. *Henry*, 106 U.S. 596, 601, 602 (1882); *Watt* v. *Alaska*, ___ U.S. ___, 101 S.Ct. 1673, 1678 (1981). In urging this Court to find an implied repeal, petitioner, therefore, "bears a heavy burden of persuasion . . .," *Amell* v. *United States*, 384 U.S. 158, 165 (1966), because "[o]nly a clear repugnancy between the old . . . and the new [law] results in the former giving way . . . ." *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439, 457 (1945). *See: Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 189-90 (1978); *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694, 719-20. (1975).

Because "[t]he normal rule [is] that Congress expects its statutes to be read together",[37] "when two statutes are capable

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[36] *See, e.g., United States* v. *Continental Tuna Corp.*, 425 U.S. 164, 168 (1976); *Gordon* v. *New York Stock Exchange*, 422 U.S. 659, 682 (1975); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133 (1974); *Universal Interpretive Shuttle Corp.* v. *Washington Metropolitan Area Transit Comm'n.*, 393 U.S. 186, 193 (1968); *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963); *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 565 (1963); *United States* v. *Borden Co.*, 308 U.S. 188, 198-99 (1939); *Wood* v. *United States*, 16 Pet. 342, 362-63 (1842).

[37] Currie, *Res Judicata: The Neglected Defense*, 45 U.CHI.L.REV. 317, 329 (1978).

of co-existence, it is the duty of the courts, absent a clearly expressed Congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133-34 (1974).[38] Accordingly, "[r]epeal is to be regarded as implied only if necessary to make the [later enacted law] work, and even then only to the minimum extent necessary." *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 155, (1976) *quoting Silver* v. *New York Stock Exchange*, *supra*, 373 U.S. at 357.

The Court has recognized

> "two well-settled categories of repeals by implication—(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest. . . ." *Posadas* v. *National City Bank*, 296 U.S. 497, 503.

Radzanower v. *Touche Ross & Co.*, *supra*, 426 U.S. at 154.

This case does not fall within either of those categories. Obviously, Title VII is not a "substitute" for section 1738. To discover whether there is an "irreconcilable conflict" between the two provisions requires an examination of the actual terms of Title VII and of Congress' purpose in enacting it.

No provision of Title VII is inconsistent on its face with section 1738, because Title VII does not expressly grant a claimant or respondent a de novo hearing in a federal court. Rather, all that Title VII does is to give a claimant a right to bring an action in a federal district court, grant state administrative agencies exclusive jurisdiction over such claims for a period of 60 days, and specify the weight—"substantial"—to be given

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[38] *See: Watt* v. *Alaska*, *supra*, 101 S.Ct. at 1678; *Radzanower* v. *Touche Ross & Co.*, *supra*, 426 U.S. at 155; *cf.*, *Silver* v. *New York Stock Exchange*, *supra*, 373 U.S. at 357; *Gordon* v. *New York Stock Exchange*, *supra*, 422 U.S. at 685.

by the EEOC to those state administrative proceedings. 42 U.S.C. §2000e-5(b) and (c). Title VII does not address the question of the weight which a federal court should accord any prior determinations—state or federal, administrative or judicial—and, importantly, neither the deferral nor any other provisions of Title VII refer to state judicial proceedings.

As to whether the legislative history of Title VII reveals any policy behind the statute which is "irreconcilable" with section 1738 and principles of preclusion, it is useful to consult this Court's prior decisions that have considered the legislative intent behind a parallel civil rights statute, 42 U.S.C. §1983,[39] with respect to available state remedies. In *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972), the Court noted that in enacting section 1983 Congress "clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights" because of its concern that the states could not or might not protect those rights and "that these failings extended to the state courts." Earlier in *Monroe* v. *Pape*, 365 U.S. 167, 180 (1961), the Court concluded that, because of congressional fear of "prejudice, passion, neglect [or] intolerance" in state forums, it was "abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts. . . ."

The Court found, therefore, because of the unmistakably high priority which Congress attached to providing a federal forum under section 1983, that "[t]he federal remedy is *supplementary to the state remedy*, and the latter need not be first sought and refused before the federal one is invoked." *Id.* (emphasis added).

However, despite Congress's concern over the availability of adequate state forums for the vindication of federal constitutional rights, and its decision to provide a federal forum for claims under section 1983, it did not intend to exempt such claims from traditional rules of preclusion. *Allen* v. *McCurry*,

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[39] Section 1983 was originally section 1 of the Civil Rights Act of 1871, 17 Stat. 13, and was derived from section 2 of the Civil Rights Act of 1866, 14 Stat. 27. *See, Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 545 n. 9 (1972).

supra, 449 U.S. at 98. The Court there found "only the most equivocal support" in the legislative history of section 1983 for the argument that "in cases where the state courts have recognized the constitutional claims asserted and provided fair procedures for determining them, Congress intended to override section 1738 or the common-law rules of collateral estoppel and res judicata."[40] 449 U.S. at 99.

Since Title VII is instinct with respect for state efforts to combat employment discrimination, it is difficult to believe that in enacting it Congress intended to retreat from the principles of comity and federalism embodied in section 1738, especially in those states which, like New York, had established and effectively administered remedies comparable to those of Title VII.[41] Under both section 1983 and Title VII, Congress provided "supplementary" remedies in order to open the doors of the federal courthouse, not to let unsuccessful State court litigants take a second bite at the apple.

Because Title VII cannot be distinguished from section 1983 on the basis of any underlying legislative intent to retreat from principles of preclusion, Mr. Kremer argues that what distinguishes the two provisions and makes Title VII irreconcilable with section 1738 is Title VII's "altogether 'unique' " enforcement scheme (Pet. Brief, pp. 14-15). The feature of Title VII's enforcement scheme thought by petitioner to be incompatible with giving effect to state judicial proceedings is "the 'policy of cooperation', *New York Gaslight Club, Inc.* v. *Carey*, *supra*, 447 U.S. at 64, between the Federal and state systems which is a keystone of Title VII's grand design." (Pet. Brief, p. 21). It is, therefore, appropriate to examine the legislative history of Title VII's enforcement provisions.

During 1963 and 1964 Congress considered a number of

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[40] The Court also rejected the "generally framed principle" that "every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arose". 449 U.S. at 103. Nor did it matter, for purposes of preclusion, that the underlying federal claim had been litigated "involuntarily" in the state court, in the context of a criminal trial. *Id.* at 104.

[41] Compare N.Y. EXEC. LAW, §297 with 28 U.S.C. §2000e -5; *cf.*, *Mitchell*, *supra*, 553 F.2d at 269-70.

different enforcement mechanisms in connection with Title VII of the proposed Act. The scheme eventually enacted—limited deferral to state administrative agencies, creation of a federal agency, the EEOC, without adjudicatory or enforcement powers, and establishment of a private cause of action—reflected a series of compromises between advocates and opponents of strong federal enforcement. Read in its entirety, the legislative history of Title VII's enforcement provisions hardly supports petitioner's conclusion, pieced together through selective quotation from this Court's opinions, that "a plaintiff has a 'statutory right to attempt to establish his claim in a Federal court,' *Alexander* v. *Gardner-Denver*, *supra*, 415 U.S. at 56, 'if satisfactory relief is not obtained in state *forums*,' *New York Gaslight Club, Inc.* v. *Carey*, *supra*, 447 U.S. at 67 (emphasis supplied)". (Pet. Brief, p. 10)

Rather, that legislative history repeatedly demonstrates Congress' intention to fashion a federal remedy to "supplement rather than supplant" existing state anti-discrimination remedies, *Alexander* v. *Gardner-Denver*, *supra*, 415 U.S. at 48, and in this respect is similar to section 1983. *See Monroe* v. *Pape*, *supra*, 365 U.S. at 183. The very New York procedures at issue here were repeatedly held up by the proponents of the bill as an example of existing state legislation effectively combatting the same evils sought to be reached under Title VII.[42] Where existing state remedies were in place and working, Congress evidenced the greatest possible deference and respect.

In his remarks to the Senate concerning the bill's deferral provisions, for example, Senator Humphrey, one of the advocates of strong enforcement, praised the measure as "a 'States rights bill,' and, I may say, a 'States responsibilities bill.' " 110 Cong. Rec. 12725 (1964), *1964 Legis. History*, at 3008. He made clear the supplementary nature of the proposed federal remedy:

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[42] *See, e.g.*, 110 Cong. Rec. 1643 (1964), *reprinted in* EEOC, Legislative History of Titles VII and XI of Civil Rights Act of 1964 (1968) at 3258-3259 (hereinafter cited as 1964 Legis. History) (remarks of Congressman Ryan); 118 Cong. Rec. 1635-1636 (1964), 1964 Legis. History at 3345-3346 (remarks of Congressman Reid); 110 Cong. Rec. 12595 (1964), 1964 Legis. History at 3066 (remarks of Senator Clark).

"In instances where States are unable or unwilling to provide this protection the Federal Government must have the authority to act." *Id.*[48]

Limited deferral to state administrative agencies was one means chosen by Congress to carry out its determination to make Title VII a truly supplemental remedy. Title VII also requires the EEOC to "accord substantial weight to findings and orders made in such proceedings." (42 U.S.C. §2000e-5(b)). Not only, however, does Title VII neither require nor encourage a claimant to pursue state judicial remedies, the statute itself makes no reference to state courts, and the voluminous legislative history of the 1964 Act contains no discussion of state judicial proceedings, or the role, if any, of state courts in adjudicating claims cognizable under Title VII.

On the other hand, there were protracted discussions in Congress over the division of adjudicatory responsibility between the EEOC and the federal courts, with Congress ultimately determining to allot adjudication on the *federal* plane exclusively to the latter. That is what Congress meant, and all that it meant, by its grant of a de novo hearing.

Nothing in the legislative history of Title VII's enforcement provision supports petitioner's view that Congress intended to guarantee a claimant a de novo federal trial once a state court has rejected his claim on the merits. The congressional proponents of the 1964 Act, indeed, were *opposed* to the enforcement provisions that were eventually adopted and favored instead an enforcement scheme that would have afforded neither claimants nor respondents federal court trial on the merits. Title VII's de novo provision was added to the bill, over its sponsor's objections, in order to protect *respondents* from over-zealous enforcement by the EEOC.

Thus, the version of the 1964 bill approved by the subcommittee of the House Judiciary Committee provided for investiga-

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[48] *See* the other statements of Senator Humphrey of like effect *quoted in* 2 SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 1334 (1970) and the remarks of Senators Case and Clark, both floor managers of the Bill, at, respectively, 110 CONG. REC. 7243 (1964), 1964 LEGIS. HISTORY at 3286, and 110 CONG. REC. 7205 (1964), 1964 LEGIS. HISTORY at 3344-45.

tion, prosecution, adjudication and enforcement (through cease and desist orders) by the EEOC, with Circuit Court review of its determinations under the Administrative Procedure Act.[44] This scheme was anathema to those concerned over the rights of employers and other respondents at the hands of a new federal agency, whose institutional bias was perceived as likely to be hostile to their interests. The provision which petitioner characterizes as being intended to afford claimants de novo trials was originally offered unsuccessfully by Representative Griffin as an amendment to H.R. 405 in the House Education and Labor Committee, but was later incorporated in the bill in the House Judiciary Committee at the same time that the language giving the EEOC power to issue cease and desist orders was dropped.[45] Congressman McCulloch, a member of the Judiciary Committee and the key architect of the compromise, described this change as providing a "safeguard" whereby "the employer is entitled to a hearing in a Federal court and an order by a duly appointed judge of the Federal Court."[46]

In 1971 and 1972 the entire enforcement mechanism of Title VII was subjected to wholesale re-examination during the course of consideration of the Equal Employment Opportunity Act of

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[44] The subcommittee version of HR 7152 is not printed in the legislative materials but was said to have been "identical", in pertinent part, to H.R. 405 which had been reported by the House Education and Labor Committee. *Hearings on H.R. 7152, As Amended by Subcomm. No. 5, Before the House Comm. on the Judiciary*, 88th Cong., 1st Sess., 2660 (October 15, 1963) (remarks of Attorney General Kennedy). H.R. 405 appears in *Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess., 2320-2336 (July 31, 1963).

[45] *See, Hearings on H.R. 7152 Before the Comm. on Rules*, 88th Cong., 2d Sess. 255 (1964) (remarks of Congressman McCulloch).

[46] *Hearings on H.R. 7152 Before the Comm. on Rules*, 88th Cong., 2d Sess. 252, 255 (1964).

Congressman McCulloch and seven other representatives submitted a memorandum spelling out the basis of the compromise. ("[W]e believe that the employer or labor union will have a fairer forum to establish innocence since a trial de novo is required in district court proceedings. . . .") H.R. REP. No. 914, Pt. 2, 88th Cong. (1963), *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2515-2516. For a similar explanation, see the Interpretative Memorandum submitted by Senators Clark and Case, the floor-managers of the Bill, 110 CONG. REC. at 7213-14 (1964), 1964 LEGIS. HISTORY at 3044.

1972.[47] During the course of the debates, Congress again considered proposals to give the EEOC adjudicatory and enforcement powers, subject to review in the Courts of Appeal under the Administrative Procedure Act.

Those who opposed giving the EEOC such powers argued against placing investigatory, adjudicatory and enforcement powers in a single agency.[48] Senator Allen, for instance, referred to the EEOC as a "hanging jury" and characterized the proposal as "a dangerous grab for power . . . deliberately designed to subvert the prime tenet of Anglo-Saxon jurisprudence that an individual is presumed to be innocent until proven guilty." 117 Cong.Rec. 42026 (1971), *reprinted in* Senate Committee on Labor and Public Welfare, Subcommittee on Labor, *Legislative History of the Equal Employment Opportunity Act of 1972* at 571 (1971) (hereinafter cited as *1972 Legis.History*). Elsewhere he characterized the EEOC as "a rabid advocate of its own preconceived ideas of fair employment opportunity." 118 Cong. Rec. 932 (1972), *1972 Legis.History* at 807.[49]

Senators Javits and Williams, both advocates of stronger enforcement, attempted to break the deadlock that arose over this question by introducing an amendment which, instead of granting the EEOC cease and desist powers, would have required the District Court to accept its certified findings. 118 Cong.Rec. 3050, 3373-74 (1972). However, the opponents held fast, insisting that the "amendment really makes a rubber stamp or a 'cat's paw' out of the Federal District Court, rather than to allow it to try these charges de novo and not merely from the record". 118 Cong.Rec. 3379 (1972), 1972 *Legis. History* at 1419 (Remarks of Senator Allen).

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[47] Pub.L. 92-261, March 28, 1972, 86 Stat. 104.

[48] *See, e.g.*, 117 CONG.REC. 32106 (1971), 1972 LEGIS. HISTORY at 301 (remarks of Congressman Broomfield).

[49] *See*, the similar views of Senator Ervin at 118 CONG.REC. 311, 933 (1972), 1972 LEGIS. HISTORY at 632, 809; Senator Tower at 118 CONG.REC. 595 (1972), 1972 LEGIS. HISTORY at 680; and Senator Fannin at 118 CONG.REC. 699-703 (1972), 1972 LEGIS. HISTORY at 704.

The Bill eventually passed only in a compromise form, whereby the EEOC for the first time was given the power to bring suit but hearing and enforcement powers were retained in the federal District Court rather than the EEOC so that employers and other respondents would receive "an impartial judicial decision free from accusation of institutional bias". S.Rep.No. 92-415, 92d Cong. 1st Sess. 86 (1971) (Views of Senator Dominick[50]), *1972 Legis. History* at 494.

Most importantly, during the 1971 and 1972 debates, in the light of seven years' experience since enactment of the 1964 Bill, Congress recognized and sought means to deal with the problems of duplicative litigation against a single respondent. Senator Hruska, for example, expressed his view that "one's sense of fairness is challenged" by "all the proceedings, the collateral proceedings and the independent proceedings in half a dozen forums that could be conducted simultaneously on the same alleged offense." 118 Cong.Rec. 3369 (1972), *1972 Legis. History* at 1398. Those who supported vigorous enforcement also recognized the existence of the problem.[51] Senator Hruska introduced an amendment designed to cure the problem by making Title VII an exclusive federal remedy.[52]

Senator Javits, ranking Republican on the Labor Committee, where the 1972 Bill originated, and Manager for the Senate in the Conference Committee, replied to Senator Hruska by expressing his view that such an amendment was unnecessary to deal with repetitive litigation against a single defendant:

> Furthermore, there is the real capability in this situation of dealing with the question on the basis of res judicata. In other words once there is a litigation—a litigation started by the Commission, a litigation

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[50] Senator Dominick was the sponsor of the compromise amendment.

[51] *See, e.g.*, the views of Senator Williams at 118 Cong.Rec. 585 (1972), 1972 Legis. History at 658 (referring to the "degree of inequity and unfairness where people across the country can be subject to investigation and lawsuit from many quarters"), and at 118 Cong.Rec. 297 (1972), 1972 Legis. History at 588.

[52] *See*, Amendment Number 877, 118 Cong.Rec. 3172-73 (1972), 1972 Legis. History at 1382.

> started by the Attorney General, or a litigation started by the individual—the remedy has been chosen and can be followed through and no relitigation of the same issues in a different forum would be permitted.

Id., at 3370, *1972 Legis. History* at 1400-1401.

There is, therefore, no indication in the legislative history of either the 1964 or 1972 Act of any policy behind Title VII creating an "irreconcilable conflict" with section 1738 and principles of res judicata and collateral estoppel. On the contrary, Title VII's "complex" enforcement scheme is in reality entirely in harmony with those traditional principles, which, in turn, enhance Title VII's policy of giving maximum scope to state and local efforts to end discrimination in employment.

There is no reason to believe that the 1964 and 1972 Congresses, on the one hand, endorsed the continued vitality of parallel state antidiscrimination laws, and, on the other, intended to permit federal courts to deny finality to state court judgments determining antidiscrimination claims. Implicit in Congress' decision to permit employment discrimination claims to be brought in a number of different forums is its assumption, voiced by Senator Javits, that res judicata would prevent relitigation once a *judicial* determination had been reached in one of the available forums.[53]

Unable to find in the legislative history any indication that Congress intended to exempt Title VII plaintiffs from the

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[53] The Government's brief suggests, at 14, that Congress' intent will be negated, and Title VII "eviscerate[d]", if the result below is affirmed. This is because a state court judgment of dismissal following an employee's appeal is asserted to be indistinguishable from one following an employer-initiated appeal. In the latter case, res judicata and 28 U.S.C. §1738 would bar federal litigation of a Title VII claim even though the employee—for whose benefit Title VII was enacted—never affirmatively sought to invoke the state judicial process.

There are several answers to this hypothetical "horrible". First, this case does not involve that situation. Whether an affirmance in this case would require the result decried by the Solicitor General is a question which this

operation of section 1738, petitioner reads several decisions of the Court as sanctioning the radical departure he advocates from the established rule. Petitioner's interpretation of this Court's Title VII jurisprudence, however, is based upon a misreading of the cases, is not required in order to maintain the integrity of

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Court will undoubtedly address in the future, not in the abstract, but in the context of an actual statutory scheme and live case and controversy.

Because of the wide variety of statutory schemes created by the different states to combat employment discrimination, it is simply speculative whether, in any given case, the involuntariness of the employee's participation in the state judicial process should outweigh the presumptive reliability of state court reversal of an agency's finding in an employee's favor (which, in New York, at least, can only occur after a public hearing). *Allen* v. *McCurry, supra*, 449 U.S. 90.

Second, the hypothetical raised by the Government is disturbing only if it is assumed that Congress enacted Title VII out of distrust for the state courts and *solely* in order to provide a (friendly) federal forum for the benefit of employees. Such, however, is not the case; Congress respected genuine state efforts at eradicating discrimination (of which New York was a model) and provided for Federal court trials at least in part to shield employers from the EEOC (thought to be biased in favor of employees). Congress, moreover, evidenced a concern that "localities hostile to civil rights might enact sham discrimination ordinances for the purpose of frustrating the vindication of federal rights." *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 763 (1979). This concern—itself indicating that Congress recognized the preclusive effect that a state court judgment would have—can be protected against by a stringently limited exception to preclusion (which would, at least, find support in Title VII's legislative history) in the case of bad faith or collusive "entrapment" of a complainant in a sham state or local anti-discrimination statute or ordinance. No one has ever suggested that New York's Human Rights Law is such a statute.

Third, the "untenability" of the distinction advanced in *Mitchell, supra*, between employee-initiated and employer-initiated appeals, is far from apparent, especially when one heeds this Court's admonition that repeal of an earlier statute (*i.e.*, §1738) "is to be regarded as implied only if necessary to make [a later enacted statute; *i.e.*, Title VII] work, and even then only to the minimum extent necessary". *Radzanower* v. *Touche Ross & Co., supra*, 426 U.S. at 155, *quoting Silver* v. *New York Stock Exchange, supra*, 373 U.S. at 357. If according res judicata effect to state court dismissals of employment discrimination claims would, in the case of employer-initiated appeals, "eviscerate" Title VII, then Title VII can—to that "minimum extent necessary"—be read to override §1738. To thus harmonize the two policies—as *Mitchell* suggests—would give effect to both statutes. To reverse the decision below, however, because of a speculative evisceration of Title VII under a case not before this Court would be unnecessarily to gut §1738 and rescind two-hundred years of jurisprudence.

Title VII, and would create a spurious and unnecessary conflict with section 1738.

Petitioner relies primarily upon *Alexander* v. *Gardner-Denver, supra*, and secondarily upon *Chandler* v. *Roudebush*, 415 U.S. 840 (1976) and *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). None of these cases, however, dealt at all with: (1) prior state proceedings—either administrative or judicial, (2), any prior judicial proceeding, (3) section 1738, and principles of res judicata applied to a judgment, or (4) issues of state-federal relationships and powers.

Alexander v. *Gardner-Denver, supra*, dealt only, as the Court stated in the opening paragraph of its opinion, with "the proper relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements . . . ." 415 U.S. at 38. The question of preclusion in that case involved not section 1738, which is inapplicable to an arbitral decision, but rather what weight should be accorded to a determination made by an arbitrator, who "has no authority to invoke public laws", but only "authority to resolve . . . questions of contractual rights. . . ." 415 U.S. at 54.[34]

Chandler v. *Roudebush, supra* and *McDonnell-Douglas Corp.* v. *Green, supra*, both considered the preclusive effect to be given to a determination by a federal agency, the EEOC, and in both cases the Court concluded that the District Court could not merely review the EEOC's determination in an appellate capacity, but was required to ascertain the facts itself. It scarcely need be noted that such a holding is not a holding that a prior state court judgment can be disregarded.

Alexander v. *Gardner-Denver, Chandler* v. *Roudebush*, and *McDonnell Douglas Corp.* v. *Green*, in short, all examine the relationships between the federal courts and forums whose determinations are not subject to 28 U.S.C. §1738. *Allen* v.

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[34] The Court also based its decision on the ground that it would be manifestly unfair to hold that an employee could "waive" his Title VII rights via a collective bargaining agreement, where such a decision would be made by union-management negotiations, not by a personal, knowing decision

McCurry, supra, not those decisions, is the surer guide when the prior decision is that of a forum to which §1738 applies.

Finally, petitioner also relies upon *New York Gaslight Club, Inc.* v. *Carey, supra*, in which this Court determined that an individual who had successfully prosecuted an employment discrimination claim through New York's agencies and courts could, in a suit under Title VII, recover an award of attorneys' fees for work done in the state proceedings. While the Court did not especially address the issue, it was implicit in its decision that the favorable disposition of the employment discrimination claim by the state tribunals was dispositive of the merits of that claim for purposes of Title VII as well. This is necessarily so, because otherwise the employer would have been entitled to relitigate the merits of the Title VII claim in contesting the award of attorneys' fees which is authorized by Title VII, but not by the New York law. Unless this reading of *New York Gaslight Club* is incorrect, the petitioner here can prevail only if the preclusive effect of state court proceedings on the merits depends on whether the claimant or the employer wins. Nothing in 28 U.S.C. §1738 or in Title VII justifies such unequal treatment of parties, both of whom had the opportunity to and did litigate the validity of the discrimination claim in state court.

III. Denying Binding Effect to the Judgment of the Appellate Division Would Be Inconsistent with Basic Tenets and Values of Comity and Federalism.

Recognizing, perhaps, that Title VII does not explicitly override the significant interests of repose, comity, and federalism which find expression in 28 U.S.C. §1738 and common law doctrines of preclusion, petitioner argues that according binding effect to the Appellate Division's judgment will actually impinge on those interests.[35] (Pet. Brief, at 9, 20, 22, 25.) Petitioner reasons that, if the decision below stands, the EEOC and state agencies "will surely start to inform complainants that an Appellate Division appeal will foreclose a Title VII action in

[35] The government's brief sounds the same theme, at pp. 13, 23.

Federal Court". (Pet Brief, at 25 n. 20.) This, in turn, will discourage complainants from seeking state court review of their claims, resulting in a deterioration in the overall quality of the state administrative process and an increase in the federal court caseload. *Id.*, at 25.[56]

In addition to omitting from the equation Chemico's right to be free from the vexation of repetitious litigation, petitioner's calculus is paradoxical in several respects. He assumes (without empirical basis) that complainants will abandon the state judicial process and then laments that hypothetical abandonment of a process the intrinsic worthlessness of which is essential to his central argument (*viz.*, that Appellate Division review is no more than a rubber stamp of inadequate administrative procedures). He warns that, without judicial review, the integrity of the state administrative process will deteriorate; yet the thrust of his appeal is that that process already is without integrity. He asserts (Pet. Brief at 9, 20), that Congress, in enacting Title VII, intended to encourage full use of state remedies (*including appeals to state courts*), yet overlooks the 60-day limit built into its deferral provision. 42 U.S.C. §2000e-5(c).

Moreover, the result advocated by petitioner, by permitting relitigation in federal court of claims disposed of by state court judgments, would deprive the Appellate Division's judgment of the binding effect to which it is entitled. Thus, even assuming that the decision below will diminish resort to state remedies, the result sought by petitioner would, by denigrating state courts and legislative schemes, have a far more damaging effect on

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[56] By asserting that future complainants "will soon learn not to blunder across the line from state agencies to state courts" (Pet. Brief, at 25), petitioner unwittingly undermines the argument which implicitly underlies his case: that preclusion of a plenary federal trial based upon the inadvertent pursuit of state appellate remedies constitutes an unfair "trap for the unwary." *See* Pet. Brief, at 26. The bright-line test developed in *Mitchell* and in this case by the Second Circuit clearly obviates that danger in the future, robbing petitioner's argument of its force. The standard advocated by petitioner, on the other hand, whereby this Court would accord full faith and credit to state court judgments on a case-by-case basis and only after assessing the fairness of each state's treatment of each complainant's grievance, offers the prospect of uncertainty and, consequently, of unfairness.

principles of federalism and comity. *Cf. Board of Regents* v. *Tomanio*, 446 U.S. 478, 488, 491-92 (1980).[57]

And, to the extent that Appellate Division review ensures the fairness and efficacy of the state administrative procedures, it cannot be gainsaid that that review will be more searching and effective if the agency and the members of the reviewing court believe that the review is binding and, therefore, meaningful.

The prediction of increased federal dockets is similarly ironic. The assumption that more federal Title VII cases will be instituted if the Second Circuit's decision below is affirmed can only rest on the premise that a substantial number of complainants who might otherwise appeal *and win reversals from the Appellate Division* will now proceed directly from the NYHRD to federal court.[58] The hypothetical bypass of state court remedies would, therefore, be significant—in terms of federal caseloads—only if it is assumed, contrary to petitioner's own views, that the Appellate Division effectively polices the NYHRD. Petitioner's warning that the federal dockets will become congested as the result of the decision below is, therefore, fundamentally at odds with his belief that the Appellate Division rubber stamps administrative dismissals of discrimination claims.[59]

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[57] In *Board of Regents* v. *Tomanio*, *supra*, this Court enforced the tolling provision of New York's statute of limitations, holding that an action pursuant to 42 U.S.C. §1983 was time-barred despite the prior maintenance of related state court proceedings. The court below had refused to apply New York's tolling provision (which did not toll the statute during the pendency of the state litigation), reasoning that considerations of federalism would be undermined by the adoption of a tolling rule which would discourage resort to state remedies prior to the institution of a federal civil rights suit under §1983. This Court unequivocally rejected that reasoning, holding that the disregard of New York's tolling provision would be far more deleterious to federalism. It is equally unavailing to contend, as does petitioner, that disregard of the Appellate Division's judgment (deemed final and binding both by the New York legislature and courts) would, by theoretically encouraging full use of state remedies, further the goals of federalism.

[58] If the decision below were reversed, complainants *unsuccessfully* appealing to the Appellate Division could and would still proceed to federal court.

[59] In a different vein, petitioner asserts that, even if the result below does achieve a conservation of federal court resources, it would do so—unacceptа-

Petitioner's public policy arguments for denying preclusive effect to the Appellate Division's judgment are, thus, based upon self-contradictory assumptions and unsound logic. Even more fundamentally, these arguments overlook the fact that the doctrine of res judicata itself "serves vital public interests" and constitutes a "rule of fundamental and substantial justice", to which prudential exceptions do not apply. *Federated Department Stores, Inc.* v. *Moitie, supra*, 101 S.Ct. at 2429 (1981).

> "Simple justice" is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's *ad hoc* determination of the equities in a particular case. There is simply "no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata*." *Heiser* v. *Woodruff*, 327 U.S. 726, 733.

Id.

By uniformly applying this well-recognized rule to the judgments of state courts, federal courts further both the states' interest in the finality of their judgments and the interests of federalism and comity, which require that full faith and credit

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bly—"at the expense of the unwary and the uninformed". (Pet. Brief, at 26.) Judicial economy might result, but "[p]*ro se* plaintiffs like petitioner [would be] especially likely to fall into *Sinicropi*'s trap". *Id.* Thus, reasons petitioner, if the price of judicial economy is that Title VII plaintiffs "must settle for a cursory state administrative procedure and a sharply restricted state court review . . . then the price is too high." *Id.* Of course, this overlooks petitioner's own concession that, if the decision below stands, the EEOC and state agencies "will surely start to inform complainants that an Appellate Division appeal will foreclose a Title VII action in Federal Court" (Pet. Brief, at 25 n. 20), with the result that plaintiffs will no longer "blunder across the line from state agencies to state courts." *Id.*, at 25. Thus, it is simply untrue that the decision below means that Title VII complainants "must" settle for administrative procedures and state court review. They will remain free—as was petitioner—to move directly from the state agency to the federal courthouse. The contrary result, contended for by petitioner, would result in a duplication of judicial effort which Congress never contemplated and, indeed, which one of the legislators most involved in the 1972 debates over Title VII (Sen. Javits) explicitly rejected. *See* pages 35-36, *ante*.

be accorded to final judgments arrived at by state courts of competent jurisdiction. In serving these weighty interests, the decision below trenches on no significant interests of Title VII complainants, who remain free to pursue their state administrative remedies and their subsequent federal plenary actions.

CONCLUSION

For the reasons discussed above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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October 15, 1981

SUPPLEMENTAL APPENDIX

Note: Certain of the documents printed in this Supplemental Appendix, pursuant to Rules 30 and 33 of this Court, contain handwritten marginalia, some of which are illegible. We have not attempted to print these marginalia. The original documents can be read in the Record on file with the Court.

NYHRD NOTICE OF CONFERENCE, JULY 30, 1976, ENCL. 2 TO KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

STATE OF NEW YORK:
EXECUTIVE DEPARTMENT
STATE DIVISION OF
HUMAN RIGHTS
on the complaint of

RUBIN KREMER
Complainant,

—against—

CHEMICAL CONSTRUCTION CORPORATION
Respondent

NOTICE OF CONFERENCE AND PRODUCTION OF RECORDS
(Investigation of verified complaint)
Case No.
IA-E-AC 3576-76E

TO: Mr. Rubin Kremer
3741 Mathews Avenue
Bronx, New York 10467

YOU ARE HEREBY NOTIFIED to appear and attend before MARTHA GARLAND, FIELD REPRESENTATIVE duly designated herein of the New York State Division of Human Rights, at his office, 270 Broadway, New York, N.Y. 10007, Room 922, 9th floor, State of New York, on August 12, 1976, at 10:00 A.M. for a conference in connection with the investigation in the above-entitled proceeding wherein the respondent has been charged with an unlawful discriminatory practice relating to EMPLOYMENT in violation of Section 296 of the Human Rights Law. You may bring a lawyer if you desire, but it is not necessary for you to do so. HOWEVER, THE OTHER SIDE CAN BRING A LAWYER AND IS SO ADVISED.

Please bring with you all witnesses, books, papers, records and documents pertaining to this matter, including:

Dated: JULY 30, 1976

STATE DIVISION OF HUMAN RIGHTS
By: /s/Martha Garland
Field Representative
Phone No. 488-5828

Human Rights Law (Executive Law, Art. 15).

"Sec. 295 General powers and duties of division. The division by and through the commissioner or his duly authorized officer or employee, shall have the following functions, powers and duties:

7. To * * * subpoena witnesses, compel their attendance, administer oaths, take the testimony of any person under oath, and in connection therewith, to require the production for examination of any books or papers relating to any matter under examination or in question before the division. The division may make rules as to the issuance of subpoenas which may be issued by the division at any stage of any investigation or proceeding before it."

KREMER LETTER OF AUGUST 22, 1975
ENCL. 3 TO KREMER LETTER OF JUNE 15, 1978,
ATTACHMENT 3 TO COMPLAINT

August 22, 1975

Dr. Thomas Gibian
Chemical Construction Corp.
One Penn Plaza
New York, New York 10001

Dear Dr. Gibian:

I am not too happy to write memos like this, I never did it before, but please read.

On July 31 I was informed by Mr. E. Paul that starting from August 1, 1975 I will be laid off. Because this lay off is a result of a long time period of conspiracy by Mr. Janoz Puc and Mr. Karl was accepted by Mr. E. Paul as a tool of power, I decided to appeal to you.

I have made this clear to the Personnel Manager, Mr. W. Magee, at the end of March 1975 when Mr. E. Paul informed me "painful" that I am laid off. This notice was cancelled.

At this time Mr. Paul found that because this lay off is a "mass action" I will not be able to blame anybody and he put my name on the list as "undesireable" employee. It would be adviseable to remark that on July 31, 1975 before Mr. Paul told me that I am laid off, the Project Engineer of Coalcon whom I handed the information concerned the methanation section of the flow being satisfied, told me that they have a lot of work and gave me the next part to work on.

Unfortunately, I had not the possibility to meet you because your secretary told me that you are busy and that you are unable to see me and sent me to the Vice President of Personnel. The Vice President of Personnel could not see me because he was preparing himself for an overseas trip.

And so I was thrown out.

Being the victim of a conspiracy should not be a reason for lay off (or firing) and should not succeed even if the victim is stateless. I would like to ask you to give me the opportunity to meet you in person and to give you further explanations which may be of great interest and useful to you. I hope that after that you will be able to draw the right conclusions. All laid off in Dept. 153 on August 1, 1975 are rehired. I think that it would be adviseable to report Mr. K. Hou's statement addressed to me before I left the company. "The time is come".

Thank you.

Sincerely,

R. Kremer

2741 Matthews Avenue
Bronx, New York 10467
Tel. 212-231-8229

Encl.: Resume

CHEMICO LETTER OF SEPTEMBER 15, 1975, ENCL. 5 TO KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

Chemical Construction Corporation

An
Aerojet-
General
Company

One Penn Plaza
New York, N.Y. 10001
(212) 239-5100 Telex: 234110
Cable: CHEMICONST

September 15, 1975

Mr. Rubin Kremer
2741 Matthews Avenue
Bronx, New York 10467

Dear Mr. Kremer:

As we discussed during our telephone conversation on Friday, September 12, there is unfortunately no appropriate opening at Chemico for you at this time. I do wish to emphasize that the individuals I spoke to regard you as a competent engineer to whom consideration would be given should an opening currently exist. It is indeed unfortunate after your two years of service at Chemico that you were laid off, and while such action is always difficult to live with, you must understand that these actions resulted from the current economic crises which Chemico is faced with. When such conditions improve I will be most happy to contact you as regards employment. It is most difficult to anticipate when that might be however.

As you requested I am forwarding a copy of your letter to Mr. Gibian, whom I am sure you will hear from shortly. May I extend an offer to help you in any way possible in your search for a new assignment.

Sincerely,

/s/ J. Kevin Coleman
Vice President
Employee Relations

JKC:bm
Enclosure

cc: T.G. Gibian

NYHRD LETTER OF AUGUST 18, 1976, ENCL. 8 TO KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
DIVISION OF HUMAN RIGHTS
270 Broadway, New York, N.Y. 10007

August 18, 1976

Mr. Rubin Kremer
2741 Matthews Avenue
Bronx, NY 10467

Re: Your case against Chemical
Construction Corporation
Case No. Ia-R-AC-3576-76E

Dear Mr. Kremer:

A field investigation report has been prepared in reference to the above-named case.

Please contact this office on or before August 31, 1976, to review Exhibits and statements presented by the respondents.

Yours truly,

/s/Martha L. Garland
Field Representative
Tele: 488-5828

MLG:mkh

cc: Dr. Pohly, Community Consultant
Anti-Defamation League
315 Lexington Avenue
New York, NY 10016

KREMER LETTER OF MAY 10, 1977, ENCL. 11 TO KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

May 10, 1977

Rubin Kremer
c/o N. Rosenberg
762 Brady Ave. Apt. 127
Bronx, New York, N.Y. 10462

The State Human Rights Appeal Board
Two World Center, 82nd Floor
New York, N.Y. 10047

Case Nos. Ia-E-AC-3576-76E
E-AC-42821-76E

Gentlemen:

I would like to ask the State Human Rights Appeal Board to reconsider the question under investigation, and to annull the decision of the New York State Executive Department, Division of Human Rights, at 270 Broadway, N.Y., dated April 28, 1977 on the following ground.

1. The Conference arranged by the Human Rights Division at 270 Broadway, N.Y. for Conference and Production of Records, on August 12, 1976 in the New York State H.R.D. did not take place and within 338 days the H.R.D. was unable or unwilling to bring the parties together.

2. On August 24, 1976 during a review of the Exhibits presented by the respondent and prepared by Mr. Don Steenland I verbally turned down all the statements entirely and demonstrated with documents that they are untrue and false.

3. The Field Representative Ms. Martha Garland failed to include in her "Complainant's Rebuttal to correspondent's" the basic information surrounding my termination, e.g., the people hired and rehired in August 1975 after my termination and other information which I submitted to her then.

4. The Basis for no Probable Cause, prepared by Field Representative Ms. Martha Garland are untrue and tendentious.

5. Mr. J. Kevin Coleman, Vice President of Employee Relations of Chem. Constr. Corp. in his letter of September 15, 1976 stated "I do wish to emphasize that the individuals I spoke to regard you as a competent engineer to whom consideration would be given should an opening currently exist "and" you were laid off . . . you must understand that these actions resulted from the current economic crises which Chemico is faced with". There is no statement that I was laid off because of seniority.

6. Dr. Thomas G. Gibian, President of Chemico in his letter of September 24, 1976 stated "It is indeed most unfortunate that economic conditions force the termination of devoted and qualified employees. I want you to know that every effort will be made to provide you with an assignment when we begin to rehire personnel". There is no statement that I was laid off because of seniority. Mr. J. Kevin Coleman and Mr. L. Livolsi, Vice President of Engineering were given the responsibility to provide me with an assignment when they will begin to rehire personnel. This never took place.

7. Based on Dr. Th.G. Gibians statement and on Chemico's advertisement in The New York Times I applied for a job with Chemico:

—on November 2, 1975, Ad. on Nov. 2, 1975
—on May 21, 1976, Ad. on May 16, 1976
—on July 16, 1976, Ad. on July 11, 1976
—on August 15, 1976, Ad. on August 15, 1976
—on September 8, 1976, Ad. on September 5, 1976

All the positions advertised correspondent exactly with my background and qualifications. In all cases I was turned down or there was no answer at all.

8. Mr. Don R. Steenland in his letter of September 17, 1976 to the N.Y. State Div. of Human Rights stated "In summary, I would like to reastate the fact that Mr. Kremer was not let go for religious or age discrimination reasons, but merely as a function of both lack of work in his area as well marginal ability. Further

we want to make it very clear that we would not re-employ him merely for the sake of appearing his claims against Chemico".

9. Mr. John Puc, former supervisor, despite his negative attitude towards me, in his opinion of May 27, 1976 could not deny the following, "He was technically competent piping analytical engineer with excellent background in other engineering branches such as process, exceeding the average experience of piping analytical engineer. His performance was qualitatively very good. Unfortunately his competence was offset by his slowness in performance of his duties."

There were never complaints from the Project Management of my "slowness". On the contrary, the Management was satisfied when I pointed out incorrectness in order to avoid unnecessary work in our department as well in other departments to whom we released information for further performance.

10. On July 31, 1975 when I was told that I am laid off I worked with Coalcon. The job just started and the Project Engineer told me that they have a lot of work. To my knowledge, Coalcon sent a list of employees to the Management of Chemico whom Coalcon wanted to continue their work. I was on this list, only I was turned down "by someone who has power."

11. The following people were hired and in some cases rehired in the Piping Analytical Department 153 of Chemical Process Plant Co./CPPC/in August 1975.

—Mr. Parish Shah, age about 25-27, was hired on August 8, 1975. He did not work previously in the Piping Analytical Department 153 of CPPC.
—Mr. Navin Shah, age about 25-27, rehired on August 10, 1975. Laid off on August 1, 1975.
—Mr. Tapan Banerjee age about 25, was hired about August 23, 1975. He never previously worked in Piping Analytical Department 153 of CPPC. Laid off on October 31, 1975 and transferred to Coalcon.
—Mr. Krishma Raj was rehired sometime in August 1975. Laid off on August 1, 1975.

12. There was no lack of work in the Chemical Process Plant Co. Specific conditions allowed the conspirators namely, Mr. John Puc and E. Paul to remove me from the Company on August 1, 1975.

Mrs. Klara Balmazi and I were laid off at the end of March 1975. Both Jewish. They failed to fire me at that time.

13. Seniority was not a criteria in any Department of CPPC during the lay-off and the rehire action.

14. After an investigation on Nov. 9, 1976 Ms. Lillian H. Fennel, Regional Director of the Human Rights Division stated "you were fired because you are Jewish not because of your age."

Mr. George C. Findlay, Regional Director of the H.R.D. during a brief appointment at the end of March 1977 told me "your case looks favourable".

Therefore I ask the State Human Rights Appeal Board the following:

A. To reconsider this case from the beginning.

B. To call together the parties involved for a recorded hearing.

C. To examine the following witnesses in my presence in the order listed below. [See next page].

D. To annul this lay off on August 1, 1975 and to adjudge full compensation for the time I was unable to get a job.

Sincerely,

/s/R. Kremer

Encl.: 5 copies of appl. for
a job with Chemico.

C. To examine the following witnesses in my presence in the order listed below.

1. Mr. John Puc, Supervisor, Chemical Process Plant Co., One Penn Plaza, New York, N.Y. 10001

2. Mr. E.V. Paul, Supervisor, Chem. Process Plant Co., One Penn Plaza, New York, N.Y. 10001

3. Mr. Carls, Vice President, Coalcon, One Penn Plaza, N.Y. 10001

4. Mr. L. Livolsi, Vice President, Chem. Process Plant Co., N.Y. One Penn Plaza, 10001

5. Mr. J. Kevin Coleman, Vice Pres. Employee Relations, Chem. Construction Corp., One Penn Plaza, N.Y. 10001

6. Dr. Thomas G. Gibian, President, Chemical Construction Corporation, One Penn Plaza, New York, 10001

7. Mr. Parish Shah, Employee, Chem. Proc. Plant Co., One Penn Plaza, New York, N.Y. 10001

8. Mr. Navin Shah, Employee, Chem. Process Plant Co., One Penn Plaza, New York, N.Y. 10001

9. Mr. Tapan Barnerjee, Employee, Chem. Proc. Plant Co., One Penn Plaza, New York, N.Y. 10001

10. Mr. Krishma Raj, Employee, Chem. Proc. Plant Co., One Penn Plaza, New York, N.Y. 10001

11. Mr. Don Steenland, Personnel Director, Chem. Construction Corporation, New York, N.Y. 10001

12. Ms. Klara Balmazi, Employee, Badger Co., Boston, Mass.

13. Dr. Henry Pohly, Anti-Defamation League, 315 Lexington Ave., New York, N.Y. 10016

KREMER LETTER OF NOVEMBER 2, 1978, ATTACHMENT 1 TO KREMER LETTER OF MAY 10, 1977, ENCL. 11, ATTACHMENT 3 TO COMPLAINT

November 2, 1975

Rubin Kremer
2741 Matthews Ave.
Bronx, New York, N.Y. 10467

CHEMICAL PROCESS PLANTS CO.
PERSONNEL DEPARTMENT
ONE PENN PLAZA
NEW YORK, N.Y. 10001

MR. D. R. STEENLAND

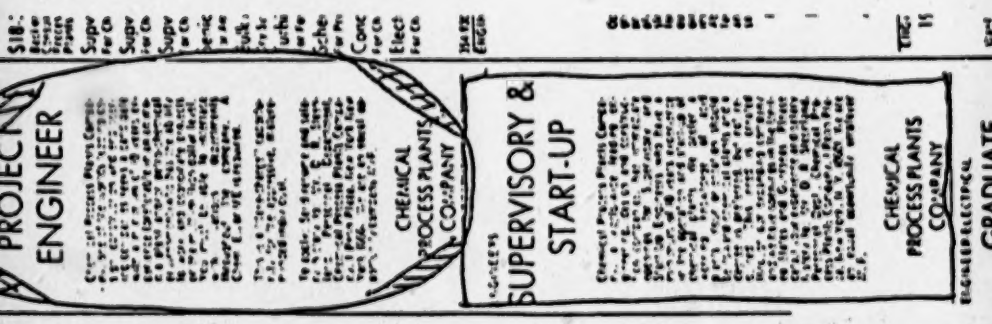
Dear Mr. Steenland:

In response to your advertisement in The New York Times on November 2, 1975 I am sending you my resume for your consideration and I am looking forward to hearing from you.

Sincerely,

/s/R. Kremer

cc: J. Kevin Coleman
Vice President
Employee Relations



KREMER LETTER OF MAY 21, 1976,
ATTACHMENT 2 TO KREMER LETTER
OF MAY 10, 1977,
ENCL. 11, ATTACHMENT 3 TO COMPLAINT

May 21, 1976

Rubin Kremer
2741 Matthews Ave.
Bronx, New York, N.Y. 10467

Coalcon
One Penn Plaza
New York, N.Y. 10001

Mr. S.R. Button, Personnel Dept.

Dear Mr. Button:

With reference to your advertisement in The New York Times on May 16, 1976 I am sending you my resume and I am looking forward to hearing from you.

Sincerely,

R. Kremer

ENGINEERING OPPORTUNITIES WITH COALCON

Coalcon is an affiliate of Union Carbide and a subsidiary of Air/Jet/General. This new energy conversion company has been awarded the largest ERDA coal conversion contract in existence and has immediate needs for project engineers and managers to plan and direct the design of plants producing liquid and gaseous fuels from coal.

PROJECT ENGINEERS: These positions require 10 plus years experience with engineering contractor firms and strong technical background in the design and erection of chemical process plants and refineries.

PROJECT MANAGERS: We require 10-15 years with engineering contractor firms and the ability to monitor technical input from engineers and subcontractors. Prior coal conversion experience a plus.

ENGINEERING DESIGN SUPERVISORS: We seek 10 or more years experience for openings in all design disciplines.

We are currently located in mid-Manhattan and anticipate relocating to Northern New Jersey by Jan. 1. These positions are immediately available and offer competitive salaries and comprehensive benefits. For prompt consideration, forward a complete resume in confidence to: Mr. S.R. Button, Personnel Department, Coalcon, 1 Penn Plaza, New York, N.Y. 10001. We are an equal opportunity employer, m/f.

COALCON

KREMER LETTER OF JULY 16, 1976, ATTACHMENT 3 TO KREMER LETTER OF MAY 10, 1977, ENCL. 11 TO ATTACHMENT 3 OF COMPLAINT

July 16, 1976

Rubin Kremer
2741 Matthews Ave.
Bronx, New York, N.Y. 10467

Coalcon
One Penn Plaza
New York, N.Y. 10001

Mr. D.R. Steenland, Personnel Dept.

Dear Mr. Steenland:

This is to request your consideration of my qualifications for employment for one of the openings listed in your ad in the New York Times on July 11, 1976.

As the enclosed resume indicates, all the openings suit exact with the requirements in your advertisement.

Please note, that Mr. J. Kevin Coleman, Vice President of Employee Relations of Chemical Construction Corporation in his letter of September 15, 1975 emphasized the following:

"I do wish to emphasize that the individuals I spoke to regard you as a competent engineer to whom consideration would be given should an opening currently exist".

Therefore, your conclusion in your letter of June 10, 1976 concerned my qualifications as a result of a discussion with my former supervisor, who had no influence on the job which I performed is unacceptable.

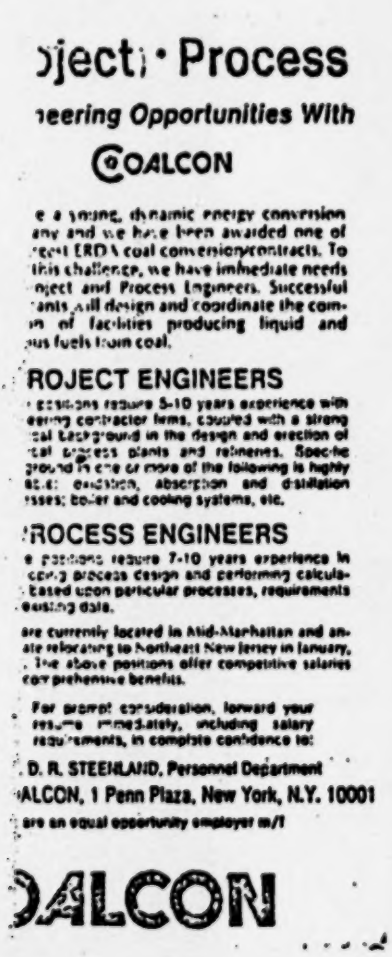
But even if your conclusion is based on reliable and honest information all the openings listed in your ad on July 11, 1976 are working positions not supervisory.

I hope that my past experience may entitle me to favorable consideration.

I am looking forward to hearing from you.

Sincerely,

R. Kremer



ɔjectɨ · Process

ɪeering Opportunities With

COALCON

e a young, dynamic energy conversion
any and we have been awarded one of
ɾecent ERDA coal conversion contracts. To
this challenge, we have immediate needs
ɔject and Process Engineers. Successful
ɾants will design and coordinate the com-
ɪn of facilities producing liquid and
ous fuels from coal.

ROJECT ENGINEERS

ɾ positions require 5-10 years experience with
eering contractor firms, coupled with a strong
ɾal background in the design and erection of
ɾal process plants and refineries. Specific
ground in one or more of the following is highly
ɑ.d: gasification, absorption and distillation
ɾsses; boiler and cooling systems, etc.

ROCESS ENGINEERS

e positions require 7-10 years experience in
ɔping process design and performing calcula-
based upon particular processes, requirements
existing data.

are currently located in Mid-Manhattan and are
ɑte relocating to Northeast New Jersey in January.
. The above positions offer competitive salaries
ɔrehensive benefits.

For prompt consideration, forward your
ɾsume immediately, including salary
ɾquirements, in complete confidence to:

D. R. STEENLAND, Personnel Department
ALCON, 1 Penn Plaza, New York, N.Y. 10001
are an equal opportunity employer m/f

ALCON

COALCON JOB ADVERTISEMENT, AUGUST 15, 1976, ATTACHMENT 4 TO KREMER LETTER OF MAY 10, 1977, ENCL. 11 TO ATTACHMENT 3 OF COMPLAINT

COALCON

• Engineering • Technical • Financial

Career Opportunities

We are a young, dynamic energy conversion company and we have been awarded one of the largest ERDA coal conversion contracts. To meet this challenge, we have immediate needs for the following personnel.

☐ **ENGINEERS** Successful applicants will design and coordinate the conversion of facilities producing liquid and gaseous fuels from coal.

PROJECT ENGINEERS These positions require 5-10 years experience with engineering contractor firms, coupled with a strong technical background in the design and erection of chemical process plants and refineries. Specific background in one or more of the following is highly desirable: acid gas removal, sulphur recovery systems, methanation, piping analytical and distribution systems, distillation and fractionation.

PROCESS ENGINEERS These positions require 7-10 years experience in developing process design and performing calculations based upon particular processes, requirements and existing data.

☐ **ADMINISTRATION-PROJECTS** Engineering degree + 5-10 years experience in chem process projects, particularly with engineering contractor firms. Provide admin. assistance in area of reports, estimates, budgets, schedules and over-all monitoring.

☐ **COST ANALYST** Position requires 6-8 years experience. Control and report direct labor and charges incurred, analyze expenditures relative to budgets, audit subcontractor proposals, develop forecasts and estimates to complete. Should be engineering oriented.

☐ **SCHEDULING ANALYST** Position requires 5 years experience in CPM scheduling of large projects from design through production. Knowledge of computerized CPM techniques and related data processing.

☐ **SAFETY ENGINEER** Position requires 3-5 years safety engineering experience directly related to facilities design, preferably in the chemical or petroleum industry. Experience in an operating company would be preferred. We will require expertise in the areas of fire protection, industrial hygiene and multi-hazards analysis.

We are currently located in Mid-Manhattan and anticipate relocating to Northeast New Jersey in January, 1977. The above positions offer competitive salaries and comprehensive benefits.

For prompt consideration, forward your resume immediately, including salary requirements, in complete confidence to:

MR. D. R. STEENLAND, Personnel Department
COALCON, One Penn Plaza, New York, N.Y. 10001

We are an equal opportunity employer m/f

KREMER LETTER OF SEPTEMBER 8, 1976, ATTACHMENT 5 TO KREMER LETTER OF MAY 10, 1977, ENCL. 11 TO ATTACHMENT 3 of COMPLAINT

September 8, 1976

Rubin Kremer
2741 Matthews Ave.
Bronx, New York, N.Y. 10467

Coalcon
One Penn Plaza
New York, N.Y. 10001

Mr. D.R. Steenland

Dear Mr. Steenland:

In response to your advertisement in The New York Times on September 5, 1976 I am sending you my resume and I am looking forward to hearing from you.

Sincerely,

Rubin Kremer

September 5, 1976

F 19

Engineering • Technical • Financial
Career Opportunities

COALCON

We have continuing needs for personnel to join our young, dynamic energy conversion company. To staff our organization for the fulfillment of one of the largest ERDA coal conversion contracts, we have immediate requirements for the following:

☐ **ENGINEERS** Successful applicants will design and coordinate the completion of facilities producing liquid and gaseous fuels from coal.

PROJECT ENGINEERS These positions require 5-10 years experience with engineering contractor firms, coupled with a strong technical background in the design and erection of chemical process plants and refineries. Specific background in one or more of the following is highly desirable: acid gas removal, sulfur recovery systems, methanation, gas analysis and distribution systems, gasification and fractionation.

PROCESS ENGINEERS These positions require 7-10 years experience in developing process design, and performing calculations based upon particular processes, requirements and operating data.

☐ **PURCHASING** Subcontract Administrators/Buyers. Positions require 10-15 years experience. Perform bid and cost price analyses; negotiation in the preparation of contracts; and recommendations for awards to sub-contractors. Knowledge of DOD, NASA, AEC, Federal procurement regulations.

☐ **COST ANALYST** Position requires 6-8 years experience. Control and report direct labor and charges incurred, analyze expenditures relative to budgets, audit subcontractor proposals, develop forecasts and estimates to complete. Should be engineering oriented.

☐ **ACCOUNTING** ***SENIOR:*** Degree + 6-8 years public/private accounting experience. Familiar with cost/fund accounting, with knowledge of APB and FASB pronouncements. Position involves complete responsibility for all records/reports including taxes.

JUNIOR: Degree + 3-5 years experience, with some knowledge of accounting systems.

☐ **SAFETY ENGINEER** Position requires 3-5 years safety engineering experience directly related to facilities design, preferably in the chemical or petroleum industry. Experience in an operating company would be preferred. Will require expertise in the areas of fire protection, industrial hygiene and multi-hazards analysis.

We are currently located in Mid-Manhattan and anticipate relocating to Northeast New Jersey in January, 1977. The above positions offer competitive salaries and comprehensive benefits.

For prompt consideration, forward your resume immediately, including salary requirements, in confidence to:

MR. D. R. STEENLAND, Personnel Department
COALCON, One Penn Plaza, New York, N.Y. 10001

We are an equal opportunity employer m/f

KREMER PETITION FOR REVIEW, DECEMBER 5, 1977, ENCL. 12 TO KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

Rubin KREMER,

Petitioner-Appellant

v.

NOTICE OF PETITION

The State Division on Human Rights,
The State Human Rights Appeal Board
and Chemical Construction Corporation,

Respondents.

SIRS:

PLEASE TAKE NOTICE that upon the annexed petition of Rubin Kremer, verified the 6 day of December, 1977, an application will be made at a term of this court to be held at the courthouse thereof, located at Madison Avenue and 25th Street, Borough of Manhattan, City of New York, on the 28 of December, 1977, at 10:00 a.m., or as soon thereafter as counsel can be heard, for a judgment pursuant to §298 of the Human Rights Law and pursuant to CPLR Article 78, setting aside the determination and order made by respondents dismissing petitioner's complaint of an unlawful discriminatory practice and denying his reinstatement as a piping analytical engineer with Chemical Construction Corporation, and compelling said respondents to reinstate petitioner as such engineer, and awarding his back pay, and for such other and further relief as may be deemed just and proper.

Dated: December 5, 1977
New York, N.Y.

YOURS, etc.

Rubin Kremer
c/o R. Garkawe
2120 Wallace Ave., Apt. 2B
Bronx, New York 10462

Tel.: 892-1322

TO: Chemical Construction Corporation
Mr. Don Steenland, Personnel Director
One Penn Plaza
New York, N.Y. 10001

State Human Rights Appeal Board
Two World Center, 82nd Floor
New York, N.Y. 10047

Donald M. Crook, Esq.
Layton & Sherman, Esqs.
50 Rockefeller Plaza
New York, N.Y. 10020

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION:
FIRST JUDICIAL DEPARTMENT

RUBIN KREMER

Petitioner,

—against- PETITION

THE STATE DIVISION OF HUMAN RIGHTS, THE STATE HUMAN RIGHTS APPEAL BOARD, and CHEMICAL CONSTRUCTION CORPORATION,

Respondents.

TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT:

Petitioner, Rubin Kremer, respectfully alleges:

1. Petitioner was employed by Chemical Construction Corporation as a piping analytical engineer from June 25, 1973 until August 1, 1975.

2. Petitioner was told that he was laid off due to lack of work. In August of 1975, petitioner learned that several people were hired and rehired in the piping analytical department.

3. The following people were hired and in some cases rehired in the Piping Analytical Department 153 of Chemical Process Co. [CPPC] in August 1975.

—Mr. Parish Shah, age about 25-27, was hired on August 8, 1975. He did not work previously in the Piping Analytical Department 153 of CPPC, and did not work on the Russian ammonia job [2008].

—Mr. Navin Shah, age about 25-27, rehired on August 10, 1975. Laid off on August 1, 1975.

—Mr. Tapan Banerjee age about 25, was hired about August 23, 1975. He never previously worked in Piping Analytical Department 153 of CPPC. Laid off on October 31, 1975 and transferred to Coalcon.

—Mr. Krishma Raj was rehired sometime in August 1975. Laid off on August 1, 1975.

4. On July 31, 1975 when I was told that I am laid off I worked with Coalcon. The job just started and the Project Engineer told me that they have a lot of work. To my knowledge, Coalcon sent a list of Employees to the Management of Chemico whom Coalcon wanted to continue their work. I was on this list, only I was turned down. There was no lack of work in this area in the Chemical Process Plant Co. Specific conditions allowed the conspirators namely, John Puc and E. Paul to remove me from the Company on August 1, 1975. Mrs. Klara Balmazi and I were laid off at the end of March 1975. Both Jewish. They failed to fire me at that time.

5. I am 60 years of age and of Jewish faith. The people hired and rehired are much younger than I, and previous to my being laid off I was the only Jewish person in the piping analytical department.

6. Mr. Don Steenlands statement that respondent's Company presently [August, 1976] has 25 Jewish people on the payroll could not prevent Mr. E. Pauls action to remove me from the Company on August 1, 1975, accepted by the Management of Chemical Construction Corporation.

7. On August 22, 1975, petitioner applied to the President of Chemical Construction Corporation, Dr. Thomas G. Gibian for reinstatement as a piping analytical engineer, but such application was rejected.

8. Dr. Thomas G. Gibian, President of Chemico in his letter to the petitioner of September 24, 1975 stated, "It is indeed most unfortunate that economic conditions force the termination of devoted and qualified employees. I want you to know that every effort will be made to provide you with an assignment when we begin to rehire personnel".

Mr. J. Kevin Coleman, Vice President of Employee Relations and Mr. L. Livolsi, Vice President of Engineering were given the responsibility to provide me with an assignment when they will begin to rehire personnel. This never took place.

9. Based on Dr. Th.G. Gibians statement and on Chemico's advertisements in The New York Times I applied for a job with Chemico:

—on November 2, 1976, Ad. on Nov. 2, 1975
—on May 21, 1976, Ad. on May 16, 1976
—on July 16, 1976, Ad. on July 11, 1976
—on August 15, 1976, Ad. on August 15, 1976
—on September 8, 1976, Ad. on September 5, 1976

All the positions advertised correspondent exactly with my background and qualification. None of the advertisements called for engineers who had previous experience with Chemico or in the U.S., as respondent contended. However, the advertisements on August 15, 1976 and on September 5, 1976 called for engineers with piping analytical experience, a position I held previously with Chemico.

10. Mr. John Puc, former supervisor, despite his negative attitude towards me in his opinion of May 27, 1976 could not deny the following, "He was technically competent piping analytical engineer with excellent background in other engineering branches such as process, exceeding the average experience of piping analytical engineer. His performance was qualitatively very good. Unfortunately his competence was offset by his slowness in performance of his duties." There were never complaints from the Project Management of my "slowness". On the contrary, the Management was satisfied when I pointed out incorrectness in order to avoid unnecessary work in our department as well in other departments to whom we released information for further performance.

11. Mr. E. Paul in his performance rating of June 19, 1975 stated, "Hold for knowledge and skills. Improve communicat." One month later on July 27, 1975 in order to remove me from the Company my performance rating became "Below Average".

It should be noted that in June 1975 I worked on the insulation project of the piping system for the Russian ammonia job [2008], when I changed Mr. E. Pauls approach, with his approval, I saved an amount of money equal approximately to a ratio eight to one.

12. On May 6, 1976 petitioner filed a charge of discrimination against Chemical Construction Corporation, with the United States Equal Employment Opportunity Commission, pursuant to Title VII of the Civil Rights Act of 1964; and said Commission, pursuant to Section 706/b/ of such Act, referred the matter to the Division of Human Rights of the State of New York.

13. On May 20, 1976 petitioner filed a formal complaint with the Division of Human Rights of the Executive Department of the State of New York, alleging that Chemical Construction Corporation, unlawfully discriminated against him by refusing to reemploy him as a piping analytical engineer because of his age and crede, in violation of Section 296 of the Human Rights Law of the State of New York.

14. After the filing of the aforesaid complaint on May 20, 1976, the following proceeding ensued:

a. Pursuant to notice from the State Division of Human Rights of July 30, 1976 the Conference for Conference and Production of Records on August 12, 1976 did not take place.

b. On August 24, 1976 a review of the Exhibits presented by the respondent and prepared by Mr. Don Steenland, conducted before Martha Garland, a Field Representative of such Division. I verbally turned down all the statements entirely and demonstrated with documents that they are untrue and false [Exhibits C, D, F and H]. The Field Representative failed to include in her "Complainants Rebuttal" the basic information surrounding my termination.

c. On November 9, 1976 I was investigated by Ms. Lillian H. Fennel, Regional Director of the Human Rights Division. During this investigation I informed her, between others, that to my knowledge Chemical Construction Corporation signed the Anti-Jewish and Anti-Israeli Arab boycott.

After this investigation Ms. Fennel stated "You were fired because you are Jewish not because of your age.

There is no record in the file that this investigation took place.

d. Mr. George C. Findlay, Regional Director of the Human Rights Division during a brief appointment at the end of March, 1977 stated "Your case looks favorable". There is no record in the file that this appointment took place.

e. By determination dated April 28, 1977 the State Division of Human Rights, by George C. Findlay, Regional Director, dismissed petitioner's complaint on the ground that "The record shows that this complainant was not rehired by the respondent employer because one employee with greater seniority was chosen. The other person that was rehired, filled a lesser position than that held by complainant".

f. Mr. Don Steenland in his letter of September 17, 1976 to the New York State Division of Human Rights stated between others "Further we want to make it very clear that we would not re-employ him merely for the sake of appearing his claims against Chemico.

g. By notice dated May 10, 1977, petitioner appealed said determination to the State Human Rights Appeal Board.

h. After argument before the State Human Rights Appeal Board on September 16, 1977, by order dated November 25, 1977 the order appealed from was affirmed.

i. It should be noted that the Presiding Member Comm. R. Wong found that the file does not contain petitioners brief to the Appeal Board dated May 10, 1977.

The Appeal Board did not examine the witnesses listed on page 5 of said brief.

15. The determination by the State Division of Human Rights and the order of the State Human Rights Appeal Board constituted final agency action under the Human Rights Law of the State of New York and the Civil Practice Law and Rules.

16. Said determination and order dismissing the complaint were made in violation of law, were arbitrary and capricious, constituted an abuse of discretion, if lawfully applied, did not bar unlawful discriminatory practice, since it did not begin to run until after the denial of reinstatement.

17. By virtue of the aforesaid, petitioner was deprived of the compensation he would have received had he been reinstated, together with the normal increments to such compensation, and he has suffered damages thereby in the amount of about FORTY THOUSAND AND 00/100 DOLLARS and accrued interest.

18. The aforesaid acts on the part of CHEMICAL CONSTRUCTION CORPORATION, discriminated against petitioner by reason of his age and creed in violation of Section 296 of the Human Rights Law of the State of New York.

19. The petitioner is entitled to be reinstated as a piping analytical engineer or equal with Chemical Construction Corporation, and he is wrongfully and unlawfully being denied right to such employment, and petitioner continues to be wrongfully denied the said right, unless this Court annul the determination of the said Division of Human Rights and the order of the said Human Rights Appeal Board, and compel CHEMICAL CONSTRUCTION CORPORATION, to reinstate petitioner, as such engineer.

20. No previous application for the relief sought herein has been made to any court or judge.

WHEREFORE, petitioner prays that a final judgment be made and entered herein, reversing, annulling and setting aside the determination of the State Division of Human Rights and the order of the State Human Rights Appeal Board, and compelling CHEMICAL CONSTRUCTION CORPORATION, to reinstate petitioner as a piping analytical engineer or equal and that petitioner be so reinstated, and that petitioner be awarded damages

in the amount of about FORTY THOUSAND AND 00/100 [$40,000] DOLLARS and accured interest; and for such other and further relief as is just and proper, together with the costs and disbursement of this proceeding.

Dated: December 5, 1977
New York, New York

/s/Rubin Kremer
Petitioner

STATE AND COUNTY OF NEW YORK / SS:

Rubin KREMER, being duly sworn, deposes and says that he is the petitioner in the within action; that deponent has read the foregoing petition and knows the contents thereof; that the same are true to his own knowledge, except as to matters therein stated to be alleged on information and belief, and that as to those matters he believes them to be true.

/s/Rubin Kremer
Petitioner

Sworn to before me this
6th day of Dec., 1977

/s/Irving Goldberg
Notary Public

IRVING GOLDBERG
Notary Public, State of New York
No. 4830618
Qualified in Westchester County
Commission Expires March 30, 1978

AFFIDAVIT OF SERVICE

STATE OF NEW YORK /
COUNTY OF NEW YORK / SS:

Rubin Kremer, being duly sworn, deposes and says, that deponent is a party to the action, is over 18 years of age, and resides at

That on the 6th day of December, 1977, deponent served the within Petition and Notice upon the following, at the addresses indicated:

Chemical Construction Corporation
Mr. Don Steenland, Personnel Director
One Penn Plaza
New York, N.Y. 10001

State Human Rights Appeal Board
Two World Center, 82nd Floor
New York, N.Y. 10047

Donald M. Crook, Esq.
Layton & Sherman, Esqs.
50 Rockefeller Plaza
New York, N.Y. 10020

Said copies were served by depositing same in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office within the State of New York.

/s/Rubin Kremer

Sworn to before me this
6th day of December, 1977

/s/Irving Goldberg

IRVING GOLDBERG
Notary Public, State of New York
No. 4830618
Qualified in Westchester County
Commission Expires March 30, 1978

NYHRD LETTER OF DECEMBER 15, 1977, ENCL. 16 TO KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
DIVISION OF HUMAN RIGHTS
TWO WORLD TRADE CENTER
NEW YORK, NEW YORK 10047

December 15, 1977

Appellate Division of the Supreme Court
First Department
27 Madison Avenue
New York, N. Y. 10010

Attention: James Gilligan, Motion Clerk

Re: *Rubin Kremer v. Chemical Contruction Corp.*

Dear Mr. Gilligan:

This is a proceeding pursuant to § 298 of the Executive Law to review an order of the State Human Rights Appeal Board, affirming an order of the State Division of Human Rights that dismissed a discrimination complaint after preliminary investigation for lack of probable cause. The Office of General Counsel to the State Division of Human Rights is hereby submitting the certified record of administrative proceedings.

It is the policy of this Division that when a complaint has been dismissed by a Regional Director after preliminary investigation, rather than by the Commissioner after a formal hearing, the Office of General Counsel should not play an active role against the complainant if the latter appeals. Therefore, we are leaving to the real parties in interest, those who have been accused by the complainant of unlawful discrimination, the function of filing further papers in opposition to this proceeding.

Very truly yours,

ANN THACHER ANDERSON, General Counsel

By: ALAN J. SAKS, Associate Attorney

Layton & Sherman, Esqs.
50 Rockefeller Plaza
New York, N.Y. 10020

ATA:AJS:es

cc: Rubin Kremer
c/o R. Garkawe
2120 Wallace Ave., Apt. 2B
Bronx, N. Y. 10462

State Human Rights Appeal Board
Two World Trade Center
New York, N.Y. 10047

CHEMICO LETTER OF JUNE 10, 1976, ENCL. 17 TO KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

Chemical Construction Corporation
An Aerojet—General Company

One Penn Plaza
New York, N. Y. 10001
(212) 239-5100 Telex: 234110
Cable: CHEMICONST

June 10, 1976

Mr. Rubin Kremer
2741 Matthews Avenue
Bronx, New York 10467

Dear Mr. Kremer:

In response to your letter dated May 21, 1976, we wish to thank you for your continued interest in our company.

Unfortunately, a review of your record and a discussion with your former supervisor indicates, that while you were employed with Chemico, you did not exhibit the leadership skills necessary for the supervisory positions advertised.

Please be assured we will continue to review your file against any opening we consider you qualified for.

Sincerely,

/s/ Donald R. Steenland
Director of Employment

DRS/jh

DOCUMENT FROM NYHRD FILE, ENCL. 18 TO KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

REBUTTAL

1. Complainant stated there was one other person besides himself laid off in the Process Anal. Eng. Dpt. namely Navin Shah. In addition he stated Exibit A as it is shown, was probably organized after August 1, 1975. To the best of his knoledge Dpt. Nos. 153 and 241 were the Piping Anal. Dpts.

2. Complainant stated that Mr. Parish Shah, did not work in the Piping Analytical Dpt., also to the best of his knowledge Mr. Parish Shah has not worked on the Russian Job. In addition if Mr. Shah was reinstated to work on the Ammonia Job as respondent alleged, he felt he could have been rehired because he was familiar with the Job.

   He contendet that Emerson Paul, Supervisor, had treated him unfairly since July, 1974 when he learned he was Jewish. Complainant stated that Michal Kramer Proj. Eng. of Coalcon told him that they had a lot of work when he worked for Coalcon. [R. Kremer woked for Coalcon three days]. However, complainant was not considered for rehire.

3. Complainant stated the advertisement that appeared in The New York Times did not state if a person's experience and background had to be in the U.S. as respondent contended. In addition he felt he had the experience that was required for a position as Proj. Eng. and Superv. [See Exhibit E]. Also the engineering positions that appeared in the New York Times on August 8, and 15th appears to have an opening for not only Proj. Eng. and Process Eng., but they had positions open for Eng. with background in producing liquid and gaseous fuels from coal [see exhibit K and G].

   Complainant contended his work performance was better than the other engineers because it was not necessary for him to repeat his work.

DOCUMENT FROM NYHRD FILE, ENCL. 19 TO KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

October 6, 1976

Martha L. Garland

BASIS for NO PROBABLE CAUSE

The reasons are:

1. Investigation reveiled complainant was laid off on August 1, 1975 from the Process Analytical Engineering Department along with 14 other employees in his Department. Exh. [A + B]

2. Investigation reveiled that respondents Corporation has 37 people in its employ whom are 50 years of age and older. In addition twenty one of these employees were hired at age 50 Or over.

3. Investigation reveiled that complainant was the only Jewish employee in his department, however, respondent company *presently* has 25 Jewish people on the payroll which represents 13% of Chem. Con. Corp. work force. In addition persons of Jewish faith are employed throughout the company from managerial positions to clerks.

4. Investigation reveiled that Mr. Kremer's as a Project Engineer dates back prior to 1969 in Poland. His recent experience was limited to specific areas. [See exh. H].

   In addition respondents had the opportunity to observe complainant's work performance and they felt he could not handle the job of Project Engineer with the company [Exh.D]. [opinions of supervis]

DOCUMENT FROM NYHRD FILE, ENCL. 20 TO KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

Letter of Donald R. Steenland of September 17, 1976.

In summary, I would like to restate the fact that Mr. Kremer was not let go for religious or age discrimination reasons, but merely as a function of both lack of work in his area as well as his marginal ability. Further we want to make it very clear that we would not re-employ him merely for the sake of appearing his claims against Chemico.

I can only conclude and Mr. Kremer should give some thought to the fact that no other company has hired him either during all this time and every employer he's applied to can't be guilty of discrimination.

Mr. Puc's Opinion.

May 27, 1976

He was technically competent piping analytical Engineer with exelent background in other engineering branches such as process, exceeding the average experience of piping analytical Engineer. His performance was qualitatively very good.

Unfortunately his competence was offset by his slowness in performance of his duties.

At the time of lay off, the Piping Analytical force was cut 50%. Mr. Kremer was let go along with two other engineers. *One of the two was subsequently rehired along with another engineer from the Mechanical Department because both were needed to complete the work on Russian Ammonia Plants, and both were previously working on this project. Mr. Kremer was not considered for rehire simply because he was not involved with this project and piping analytical work on the projects he was working on was completed.* [I was working with Coalcon on Coal Gasification and the job just started.....]

DOCUMENT FROM NYHRD FILE, ENCL. 22 TO KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

Date— 7/29/75
Performance Rating.
Piping Engineering

Dept. 153 Piping Analytical

How, Karl	Competent	B
Kremer, R.	Below Average	D
Kumar, B.R.	Average	C
Puc, Jamez	Exelent	A
Razfar, N.	Competent	B
Shah, N.	Average	C

Dept 241. Stress, Hangers, and Supports.

Davidescu, G.	Competent	B
Madorma, J.	Exelent	A
Matlawski,	Competent	B
Raj, K.	Average	C

Dept. 242. Material Control 1

Abbiak, J.	Average	C
Fusco, E.	Below Av.	D
Linostrom, W.	Av.	C
Norman, R.	Competent	B
D'Arienzo, D.	Av.	C

Exhibit D6 — is based only on the opinion of Mr. E. Paul and J. Puc.

Note on application of June 20, 1976.
In his Folder. This guy never quits.

DOCUMENT FROM NYHRD FILE, ENCL. 24 TO KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

EXHIBIT C

On August 1, 1975 there was a total of 43 employees who were affected by the lay off. Of the 43 employees 35 employees were engineering personnel, 11 employees were in the piping area and two other employees besides Mr. R. Kremer were laid off in his department.

One of the employees in Mr. Kremer's department was called back. He was needed to complete the work of the Russian Ammonia Plants, since he had previously worked on this project. *Mr. Kremer was not considered for rehire, since he was not involved in this project and the work he was assigned to were complete.* The employee who was rehired, Mr. Navin C. Shah, had one more year service as well a better performance revies than Mr. Kremer. These are the specific reasons Mr. Kremer was not called back as was his associate Mr. Navin Shah. Another employee called back was Mr. Krishma Raj. However he was employed in the capacity as Eng. Ass. These are the only two employees who were laid off on August 1, 1975 who were recalled.

EXHIBIT D2

Performance revies which were completed on Mr. Rubin Kremer by his supervisors while he was working at Chemico. [very characteristic..... Please read it. No date.]

Exhibit D4 - Mr. Puc - Loyal and dependable, somewhat slow in performance. Stadily improving in efficiency. Rate -15400 [Rating 3]. Data - 6/23/74

Exhibit D3 Mr. E. Paul - Date 6/19/75
Because of his foreign background which required a certain rigor and exactness in processing engineering information, employee has been difficult to communicate with. He now has a better understanding and his work should prove more productive. Hold for his knowlege and skills. Improve Communicat[ion] Raing-3.

DOCUMENT FROM NYHRD FILE, ENCL. 25 TO KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

EXHIBIT N

February 17, 1977

Martha Garland

Investigation on January 14, 1977 — Chem. Const. Corp.

Navin Shahs personnel folder was not available, his file is in New Orleans, La.

Mr. Kramer M. and E. Paul were also investigated.

EXHIBIT L

September 17, 1976

Mr. Steenland

Reply on September 8, to the ads.

The Eng. we require are project and process types and you'll note in the attached copy of the ad we spell the requirements for both of these. Mr. Kremer never functioned in either capacity while with Chemico. [The ad does not only concern employees who previously worked with Chemico in this field.]

DOCUMENT FROM NYHRD FILE, ENCL. 26 TO KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

EXHIBIT F

In Mr. Kremers immidiate department [153] it appears that he was the only Jewish employee in that department. However in the piping departments [200, 240, 241, 242] they were to the best of ouir knowledge seven other Jewish employees.

1. Frank Muller
2. Jacob Stern
3. Sidney Zabaek
4. W. Lindstrom
5. Frank Elstner
6. Gerry Krodman
7. Ernest Schieferstein

Mr. Frank Muller and Mr. R. Kremer were the only Jewish employees terminated in the piping department on August 1, 1975. Both of these men had a short term of service with Chemico. The other six Jewish employees all had longer years of service with Chemico and were retained.

EXHIBIT I

Dr. Gibian to Mr. Coleman, [I can not read it]

Please handle 12/3/75

Don Steenland/ pls reply specifically. 12/17/75

DOCUMENT FROM NYHRD FILE, ENCL. 27 TO KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

Exhibit A

On August 1, 1975 the following employees were in the Process Analytical Engineering Department (153)

Dpt. 153	Date of Hire	Date of Birth
Karl Hou	1/8/60	6/6/19
Rubin Kremer	6/25/73	11/23/17
B. R. Kumar	4/30/73	5/30/45
Emerson Paul	6/25/56	6/7/19
James Puc	6/13/60	12/27/34
Nasser Razfar	4/16/73	8/24/42
Navin Shah	10/26/72	6/30/47
Dpt. 200		
Gianni Ralph	8/30/70	
Padradiaggro A.	10/10/54	
Elsmer Frank	"Manager Drafting."	

Dpt 240
20 empl.

Dpt 241
4 employees.

Dpt. 242
5 empl.

DOCUMENT FROM NYHRD FILE, ENCL. 27 TO KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

Exhibit A

On August 1, 1975 the following employees were in the Process Analytical Engineering Department [Dpt. 153]

	Date of Hire	Date of Birth
Karl Hou	1/8/60	6/6/19
x Rubin Kremer	6/25/73	11/23/17
x B. R. Kumar	4/30/73 [false]	5/30/45
Emerson Paul	6/25/56 [false]	6/7/19
Jamez Puc	6/13/60	12/27/34
Nasser Razfar	4/16/73	8/24/42
x Navin C. Shah	10/26/72	6/30/47

Dpt. 200, 240, 241, 242 [false]

EXHIBIT B

Nov. 1 1975 or 1976 Air Polution Control sold to Envirotech.

DOCUMENT FROM NYHRD FILE, ENCL. 28 TO KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

ANSWERS TO COMPLAINANTS ALLEGATIONS [Investigation Report]

Allegation No. 1.
Respondent agreed that complainant was employeed on June 25, 1973 as an Engineer. However they disagreed he was terminated. They stated he was *laid off along with 13 other employees who were in the Process Analytical* Eng. Dpt. [See Evaluation of performance May 27, 1976... *Mr. Kremer was let go with two others engineers ... opinion of* Mr. Puc]

Allegation No. 2.
Respondents contended that Chemical Construction Corp. was experiencing some major cutback in projects. As a result the Piping Analytical force was cut 50%. Mr. Kremer was let go with two other engin. One of the two engineers who was let go from the Piping Analytical force was rehired. In addition, an engineer from *the Mechanical Dept. was rehired to complete the work on Russian Ammonia plants. Mr. Kremer was not rehired because the projects he had worked on was completed* [Exh. D, C, - False]

Allegation No. 3.
Respondents disagreed that Chemical Const. Corp. hired those persons younger than 58, The Corporation has not hired any new employees fifty years of age and older since complainant was terminated, however Exhibit E shows 37 people employed by respondents are 50 years of age and older. According to Exhibit F the piping department has five sections namely: 200, 241, 240, 242, and 153. Mr. Kremer was employed in section 153 and in fact he was the only Jewish employee in that department. However the records shows that the piping department collectively employs seven other Jewish employees and an additional..... [There was no Piping Department on August 1, 1975]

KREMER LETTER OF DECEMBER 4, 1977, ATTACHMENT 5 TO COMPLAINT

December 4, 1977

Rubin Kremer
c/o R. Garkowe
2120 Wallace Ave., Apt 2B
Bronx, New York, N.Y. 10462

Tel.—[212]-892 1322

Equal Employment Opportunity Commission
New York District Office
90 Church Street, Room 1301
New York, N.Y. 10007

Mr. Arthur W. Stern
District Director

Charge No: TNY 6 — 1526
Re: Chemical Construction Corporation

Dear Mr. Stern:

On May 20, 1976 based on the instructions in your letter of May 7, 1976 I filed a formal complaint with the Division of Human Rights of the Executive Department of the State of New York, alleging that Chemical Construction Corporation, unlawfully discriminated against me by refusing to reemploy as a piping analytical engineer because of age and crede, in violation of Section 296 of the Human Rights Law of the State of New York.

After the filing of the complaint on May 20, 1976 the following proceeding ensued:

1. The Conference arranged by the Human Rights Division at 270 Broadway, N.Y. for Conference and Production of Records, on August 12, 1976 in the New York State H.R.D. did not take place.

2. On August 24, 1976 a review of the Exhibits presented by the respondent and prepared by Mr. Don Sttenland, Personnel Director of Chemico, conducted before Martha Garland, a

Field Representative of the Human Rights Division took place. I verbally turned down all the statements entirely and demonstrated with documents that they are untrue and false. The Field Representative failed to include in her "Complainants Rebuttle" the basic information surrounding my termination. Respondent did not attend this review.

3. On November 9, 1976 I was investigated by Ms. Lillian H. Fennel, Regional Director of the Human Rights Division. I informed the Director of the H.R.D., between others, that to my knowledge Chemical Construction Corporation signed the Anti-Jewish and Anti-Israeli Arab Boycott. After this investigation Ms. Fennel stated "You were fired because you are Jewish not because of your age". There is no record in the file that this investigation took place.

4. Mr. George C. Findlay, Regional Director of the Human Rights Division, during a brief appointment at the end of March, 1977 stated, "Your case looks favourable". There is no record in the file that this appointment took place.

5. By determination dated April 28, 1977 the State Division of Human Rights, by George C. Findlay, Regional Director, dismissed my complaint on the ground that, "The record shows that this complainant was not rehired by respondent employer because one employee with greater seniority was chosen. The other person that was rehired, filled a lesser position than that held by complainant".

6. The following people were hired and rehired in the Piping Analytical Department 153 of Chemical Process Plant Co. [CPPC] in August 1975.

   — Mr. Parish Shah, age about 25-27, was hired on August 8, 1975. He did not work previously in the Piping Analytical Dept. 153 of CPPC, and did not work on the Russian ammonia job [2008].

   — Mr. Navin Shah, age about 25-27, rehired on August 10, 1975. Laid off on August 1, 1975.

   — Mr. Tapan Ranerjee age about 25, was hired about August 23, 1975. He never previously worked in Piping Analytical Dpt. of CPPC. Laid off on October 31, 1975 and transferred to Coalcon.

— Mr. Krishma Raj was rehired sometime in August 1975. Laid off on August 1, 1975.

7. Based on Dr. Th.G Gibians statement of September 24, 1975 and on Chemico's advertisements in The New York Times I applied for a job with Chemico:

— on November 2, 1975,	Ad. on Nov. 2, 1975
— on May 21, 1976,	Ad. on May 16, 1976
— on July 16, 1976,	Ad. on July 11, 1976
— on August 15, 1976,	Ad on August 15, 1976
— on September 8, 1976	Ad. on September 5, 1976

All the positions advertised correspondet exactly with my background and qualifications. None of the advertisements called for engineers who had previous experience with Chemico or in the U.S., as respondent contendet. However, the advertisements on August 15, 1976 and on September 5, 1976 called for engineers with piping analytical experience, a position I held previously with Chemico.

8. Mr. Don Steenland in his letter of September 17, 1976 to the New York State Division of Human Rights stated between others, "Further we want to make it very clear that we would not re-employ him merely for the sake of appearing his claims against Chemico.

9. Mr. John Puc former supervisor, despite his negative attitude towards me in his opinion of May 27, 1976 could not deny the following, "He was technically competent piping analytical engineer with excelent background in other engineering branches such as process, exceeding the average experience of piping analytical engineer. His performance was qualitatively very good. Unfortunately his competence was offset by his slowness in performance of his duties".

There were never complaints from the Project Manager of my "slowness". On the contrary, the Management was satisfied when I pointed out incorrectness in order to avoid unnecessary work in our department as well as in other departments to whom we released information for further performance.

10. Mr. E. Paul in his performance rating of June 19, 1975 stated, "Hold for knowledge and skills. Improve comunicat." One month later on July 29, 1975 in order to remove me from the Company my performance rating became "Below Average". It should be noted that in June 1975 I worked on the insulation project of the piping system for the Russian ammonia job [2008], when I changed Mr. E. Pauls approach, with his approval, I saved an amount of money equal approximately to a ratio eight to one.

11. By notice dated May 10, 1977, I appealed the Human Rights Division determination to the State Human Rights Appeal Board. After argument before the State Human Rights Appeal Board on September 16, 1977, by order dated November 25, 1977 the order appealed from was affirmed.

    It should be noted that the Presiding Member Comm. R. Wong found that the file does not contain my brief to the Appeal Board dated May 10, 1977.

    The Appeal Board did not examine the witnesses listed on page 5 in my brief.

12. The determination by the State Division of Human Rights and the order of the State Human Rights Appeal Board constituted final agency action under the Human Rights Law of the State of New York and the Civil Practice Law and Rules. This determination and order dismissing th complaint were made in violation of law, were arbitrary and capricious, constituted an abuse of discretion, if lawfully applied, did not bar unlawful discriminatory practice.

Therefore I ask the United State Equal Opportunity Commission to reconsider this case in accordance to the compulsory law in the United States of America.

Sincerely,

B. Kremer

CHEMICO LETTER OF SEPTEMBER 5, 1975,
ENCL. 4 TO KREMER LETTER OF JUNE 5 , 1978,
ATTACHMENT 3 TO COMPLAINT

Chemical Construction Corporation

An Aerojet-General Company

One Penn Plaza
New York, N. Y. 10001
(212) 239-5100 Telex: 234110
Cable: CHEMICONST

September 5, 1975

Mr. Rubin Kremer
2741 Matthews Avenue
Bronx, New York 10467

Dear Mr. Kremer:

This is to inform you that in follow up to our conversation I am proceeding to investigate the facts surrounding your termination. I have spoken with several people in Chemico and right now there does not appear to be an opening which would require your background. I will continue to investigate possibilities though, and as promised will be in touch with you in the near future with more details.

Sincerely,

/s/J. Kevin Coleman
Vice President
Employee Relations

JKC:bm

EEOC LETTER OF JUNE 27, 1978, ATTACHMENT 4 TO COMPLAINT

Equal Employment Opportunity Commission
New York District Office
90 Church Street, Room 1307
New York, New York 10007
264-7161

June 27, 1978

Mr. Rubin Kremer
c/o R. Garkawe
2120 Wallace Avenue, Apt. 2B
Bronx, New York 10462

Re: *Rubin Kremer v. Chemical Contruction Corp.*
Charge No. 021-76-1526

Dear Mr. Kremer:

I am in receipt of your letter of June 15, last, in which you request reconsideration of the Determination rendered in the above-captioned matter.

Section 1601.19b(d) of the Commission's Procedural Regulations provides in pertinent part as follows:

> ...The determination is final when issued; therefore request for reconsideration will not be granted. The Commission may, however, on its own motion, reconsider its determination at anytime and, when it does so the Commission shall promptly notify the aggrieved person or the person making the charge on behalf of the aggrieved person where applicable, and the respondent...of its subsequent decision or reconsideration.

I have reviewed the case file, and have spoken at length with the investigator, with particular emphasis upon the points contained in your communication, and have concluded that the Determination as rendered is appropriate and correct in all respects. Therefore, in conformity with Section 1601.19b(d), your request for reconsideration is not granted.

Sincerely,

/s/ Aruthur W. Stern
District Director

KREMER PETITION FOR REVIEW, DECEMBER 6, 1978

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION:
FIRST JUDICIAL DEPARTMENT

RUBIN KREMER

Petitioner,

-against- *PETITION*

THE STATE DIVISION ON HUMAN RIGHTS,
THE STATE HUMAN RIGHTS APPEAL BOARD,
and CHEMICAL CONSTRUCTION CORPORATION,

Respondents.

TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT:

Petitioner, Rubin Kremer, respectfully alleges:

1. Petitioner was employed by Chemical Construction Corporation as a piping analytical engineer from June 25, 1973 until August 1, 1975.

2. Petitioner was told that he was laid off due to lack of work. In August of 1975, petitioner learned that several people were hired and rehired in the piping analytical department

3. The following people were hired and in some cases rehired in the Piping Analytical Department 153 of Chemical Process Co. [CPPC] in August 1975.

-Mr. Parish Shah, age about 25-27, was hired on August 8, 1975, He did not work previously in the Piping Analytical Department 153 of CPPC, and did not work on the Russian ammonia job [2008]

-Mr. Navin Shah, age about 25-27, rehired on August 10, 1975. Laid off on August 1, 1975.

-Mr. Tapan Banerjee age about 25, was hired about August 23, 1975. He never previously worked in Piping Analytical Department 153 of CPPC. Laid off on October 31, 1975 and transferred to Coalcon.

-Mr. Krishma Raj was rehired sometime in August 1975. Laid off on August 1, 1975.

4. On July 31, 1975 when I was told that I am laid off I worked with Coalcon. The job just started and the Project Engineer told me that they have a lot of work. To my knowledge, Coalcon sent a list of Employees to the Management of Chemico whom Coalcon wanted to continue their work. I was on this list, only I was turned down. There was no lack of work in this area in the Chemical Process Plant Co. Specific conditions allowed the conspirators namely, John Puc and E. Paul to remove me from the Company on August 1, 1975. Mrs. Klara Balmazi and I were laid off at the end of March 1975. Both Jewish. They failed to fire me at that time.

5. I am 60 years of age and of Jewish faith. The people hired and rehired are much younger than I, and previous to my being laid off I was the only Jewish person in the piping analytical department.

6. Mr. Don Steenlands statement that respondent's Company *presently* [August, 1976] has 25 Jewish people on the payroll could not prevent Mr. E. Pauls action to remove me from the Company on August 1, 1975, accepted by the Management of Chemical Construction Corporation.

7. On August 22, 1975, petitioner applied to the President of Chemical Construction Corporation, Dr. Thomas G. Gibian for reinstatement as a piping analytical engineer, but such application was rejected.

8. Dr. Thomas G. Gibian, President of Chemico in his letter to the petitioner of September 24, 1975 stated, "It is indeed most unfortunate that economic conditions force the termination of devoted and qualified employees. I want you to know that every effort will be made to provide you with an assignment when we begin to rehire personnel." Mr. J. Kevin Coleman, Vice President of Employee Relations and Mr. L. Livolsi, Vice President of Engineering were given the responsibility to provide me with an assignment when they will begin to rehire personnel. This never took place.

9. Based on Dr. Th.G. Gibians statement and on Chemico's advertisements in The New York Times I applied for a job with Chemico:

-on November 2, 1975,	Ad. on November 2, 1975
-on May 21, 1976,	Ad. On May 16, 1976
-on July 16, 1976,	Ad. on July 11, 1976
-on August 15, 1976,	Ad. On August 15, 1976
-on September 8, 1976,	Ad. On September 5, 1976

All the positions advertised correspondet exactly with my background and qualifications. None of the advertisements called for engineers who had previous experience with Chemico or in the U.S., as respondent contendet. However, the advertisements on August 15, 1976 and on September 5, 1976 called for engineers with piping analytical experience, a position I held previously with Chemico.

10. Mr. John Puc, former supervisor, despite his negative attitude towards me in his opinion of May 27, 1976 could not deny the following, "He was technically competent piping analytical enginner with excellent background in other engineering branches such as process, exceeding the average experience of piping analytical engineer. His performance was qualitatively very good. Unfortunately his competence was offset by his slowness in performance of his duties." There were never complaints from the Project Management of my "slowness." On the contrary, the Management was satisfied when I pointed out incorrectness in order to avoid unnecessary work in our department as well in other departments to whom we released information for further performance.

11. Mr. E. Paul in his performance rating of June 19, 1975 stated, "Hold for knowledge and skills. Improve communicat." One month later on July 27, 1975 in order to remove me from the Company my performance rating became "Below Average." It should be noted that in June 1975 I worked on the insulation project of the piping system for the Russian ammonia job [2008], when I changed Mr. E. Pauls approach, with his approval, I saved an amount of money equal approximately to a ratio eight to one.

12. On May 6, 1976 petitioner filed a charge of discrimination against Chemical Construction Corporation, with the United States Equal Employment Opportunity Commission, pursuant to Title VII of the Civil Rights Act of 1964; and said Commission, pursuant to Section 706/b/ of such Act, referred the matter to the Division of Human Rights of the State of New York.

13. On May 20, 1976 petitioner filed a formal complaint with the Division of Human Rights of the Executive Department of the State of New York, alleging that Chemical Construction Corporation, unlawfully discriminated against him by refusing to reemploy him as a piping analytical engineer because of his age and crede, in violation of Section 296 of the Human Rights Law of the State of New York.

14. After the filing of the aforsaid complaint on May 20, 1976, the following proceeding ensued:

a) Pursuant to notice from the State Division of Human Rights of July 30, 1976 the Conference for Conference and Production of Records on August 12, 1976 did not take place.

b) On August 24, 1976 a review of the Exhibits presented by the respondent and prepared by Mr. Don Steenland, conducted before Martha Garland, a Field Representative of such Division. I verbally turned down all the statements entirely and demonstrated with documents that they are untrue and false [Exhibits C,D,F and H]. The Field Representative failed to include in her "Complainants Rebuttal" the basic information surrounding my termination.

c) On November 9, 1976 I was investigated by Ms. Lillian H. Fennel, Regional Director of the Human Rights Division. During this investigation I informed her, between others, that to my knowledge Chemical Construction Corporation signed the Anti-Jewish and Anti-Israeli Arab boycott.
After this investigation Ms. Fennel stated "You were fired because you are Jewish not because of your age.
There is no record in the file that this investigation took place.

d) Mr. George C. Findlay, Regional Director of the Human Rights Division during a brief appointment at the end of March, 1977 stated "Your case looks favorable."
There is no record in the file that this appointment took place.

e) By determination dated April 28, 1977 the State Division of Human Rights, by George C. Findlay, Regional Director, dismissed petitioner's complaint on the ground that "The record shows that this complainant was not rehired by the respondent employer because one employee with greater seniority was chosen. The other person that was rehired, filled a lesser position than that held by complainant."

f) Mr. Don Steenland in his letter of September 17, 1976 to the New York State Division of Human Rights stated between others "Further we want to make it very clear that we would not re-employ him merely for the sake of appearing his claims against Chemico.

g) By notice dated May 10, 1977, petitioner appealed said determination to the State Human Rights Appeal Board.

h) After argument before the State Human Rights Appeal Board on September 16, 1977, by order dated November 25, 1977 the order appealed from was affirmed.

i) It should be noted that the Presiding Member Comm. R. Wong found that the file does not contain petitioners brief to the Appeal Board dated May 10, 1977.
The Appeal Board did not examine the witnesses listed on page 5 said brief.

15. The determination by the State Division of Human Rights and the order of the State Human Rights Appeal Board constitued final agency action under the Human Rights Law of the State of New York and the Civil Practice Law and Rules.

16. Said determination and order dismissing the complaint were made in violation of law, were arbitrary and capricious, constituted an abuse of discretion, if lawfully applied, did not bar unlawful discriminatory practice, since it did not begin to run until after the denial of reinstatement.

17. By virtue of the aforesaid, petitioner was deprived of the compensation he would have received has he been reinstated, together with the normal increments to such compensation, and he has suffered damages thereby in the amount of about FORTY THOUSAND AND 00/100 DOLLARS and accrued interest.

18. The aforsaid acts on the part of CHEMICAL CONSTRUCTION CORPORATION, discriminated against petitioner by reason of his age and creed in violation of Section 296 of the Human Rights Law of the State of New York.

19. The petitioner is entitled to be reinstated as a piping analytical engineer or equal with Chemical Cosntruction Corporation, and he is wrongfully and unlawfully being denied right to such employment, and petitioner continues to be wrongfully denied the said right, unless this Court annul the determination of the said Division of Human Rights and the order of the said Human Rights Appeal Board, and compel CHEMICAL CONSTRUCTION CORPORATION, to reinstate petitioner, as such engineer.

20. No previous application for the relief sought herein has been made to any court or judge.

WHEREFORE, petitioner prays that a final judgment be made and entered herein, reversing, annulling and setting aside the determination of the State Division of Human Rights and the order of the State Human Rights Appeal Board, and compelling CHEMICAL CONSTRUCTION CORPORATION, to reinstate petitioner as an piping analytical engineer or equal and that petitioner be so reinstated, and that petitioner be awarded damages in the amount of about FORTY THOUSAND AND 00/100 [$40,000] DOLLARS and accured interest; and for such other and further relief as is just and proper, together with the costs and disbursement of this proceeding.

Dated: December 5, 1977
New York, New York

/s/ Rubin Kremer
Petitioner

STATE AND COUNTY OF NEW YORK / SS.:

Rubin KREMER, being duly sworn, deposes ad says that he is the petitioner in the within action; that deponent has read the foregoing petition and knows the contents thereof; that the same are true to his own knowledge, except as to matters therein stated to be alleged on information and belief, and that as to those matters he believes them to be true.

/s/ Rubin Kremer
Petitioner

Sworn to before me this
6 day of Dec., 1977

/s/ Irving Goldberg
Notary Public

IRVING GOLDBERG
Notary Public, State of New York
No. 4630618
Qualified in Westchester County
Commission Expires March 30, 1978

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION 29C.F.R. §1601.12 Deferrals to State and local authorities

"....

"(c) 706 Agency Defined: For the purposes of this section and § 1601.10, the term "706 Agency" shall refer to an agency to which a charge is deferred. A State or local agency may be granted 706 Agency status for certain bases of discrimination and not for others. A charge shall be deferred where a State or a political subdivision of a State has a State or local law prohibiting the unlawful employment practice alleged, and said State or local law authorizes a State or local agency to grant or seek relief from the unlawful employment practice alleged or to institute criminal proceedings with respect thereto, and such State or local agency has been established and, at the time the charge is submitted to the Commission, is operational and processing charges filed under the State or local law.

(f) Because of the large number of State and local fair employment practice agencies, only those agencies which notify the Commission of their qualifications under subsection (c) of this section and request designation as "706 Agencies" or "Notice Agencies" or both will be eligible for such designation. Such notification must be submitted by written request to the Commission's Regional Director in whose region the State or local agency is located. The request shall include the following materials and information:

"....

" (5) A statement certifying the following:

(i) That the State or political subdivision has a fair employment practice law;

(ii) That such law authorizes the applicant agency or authority to grant or seek relief from employment practices found to be illegal under such law or that it authorizes the agency to institute criminal proceedings;

(iii) That such agency or authority has been established and is operational and processing charges filed under such law.

"....

" (j) Performance Standards: The continued designation of a 706 Agency will be dependent upon the 706 Agency's willingness and ability to administer its law in such a manner that, in fact, the practices prohibited are comparable in scope to those practices prohibited under Federal law and satisfy the performance standards set forth below:

(1) In all cases where the 706 Agency finds cause to credit the allegations of a charge, it shall effectively eliminate the discrimination and, where State or local law allows, provide for full compensatory and prospective relief consistent with applicable Federal law."

NEW YORK STATE HUMAN RIGHTS LAW

N.Y. EXEC. LAW § 296. Unlawful discriminatory practices

"1. It shall be an unlawful discriminatory practice:

(a) For an employer or licensing agency, because of the age, race, creed, color, national origin, sex, or disability, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

N.Y. EXEC. LAW § 297. Procedure

"....

"2. After the filing of any complaint, the division shall promptly serve a copy thereof upon the respondent and all persons it deems to be necessary parties, and make prompt investigation in connection therewith. Within fifteen days after a complaint is filed, the division shall determine whether it has jurisdiction and, if so, whether there is probable cause to believe that the person named in the complaint, hereinafter referred to as the respondent, has engaged or is engaging in an unlawful discriminatory practice. If it finds with respect to any respondent that it lacks jurisdiction or that probable cause does not exist, the commissioner shall issue and cause to be served on the complainant an order dismissing such allegations of the said complaint as to such respondent."

N.Y. EXEC. LAW § 297-a. State human rights appeal board

"1. There is hereby created in the executive department a state human rights appeal board, in this article referred to as the board, consisting of four members appointed by the governor, by and with the advice and consent of the senate. No more than three members shall be from the same political party."

N.Y. EXEC. LAW § 298. Judicial review and enforcement

"Any complainant, respondent or other person aggrieved by any order of the board may obtain judicial review thereof, and the division may obtain an order of court for its enforcement and for the enforcement of any order of the commissioner which has not been appealed to the board, in a proceeding as provided in this section. Such proceeding shall be brought in the appellate division of the supreme court of the state in the judicial department embracing the county wherein the unlawful discriminatory practice which is the subject of the order occurs or wherein any person required in the order to cease and desist from an unlawful discriminatory practice or to take other affirmative action resides or transacts business. Such proceeding shall be initiated by the filing of a petition in such court, together with a written transcript of the record of all prior proceedings and the issuance and service of a notice of motion returnable before such appellate division of the supreme court. Thereupon the court shall have jurisdiction of the proceeding and of the questions determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript an order enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part such order. No objection that has not been urged in prior proceedings shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. Any party may move the court to remit the case to the division in the interests of justice for the purpose of adducing additional specified and material evidence and seeking findings thereon, provided he shows reasonable grounds for the failure to adduce such evidence in prior proceedings. The findings of facts on which such order is based shall be conclusive if supported by sufficient evidence on the record considered as a whole. All such proceedings shall be heard and determined by the court and by the court of appeals as expeditiously as possible and with lawful precedence over other matters. The jurisdiction of the

appellate division of the supreme court shall be exclusive and its judgment and order shall be final, subject to review by the court of appeals in the same manner and form and with the same effect as provided for appeals from a judgment in a special proceeding. The division's copy of the testimony shall be available at all reasonable times to all parties for examination without cost and for the purposes of judicial review of such order. The appeal shall be heard on the record without requirement of printing. The division may appear in court by one of its attorneys. A proceeding under this section when instituted by any complainant, respondent or other person aggrieved must be instituted within thirty days after the service of such order."

RULES OF PRACTICE AND PROCEDURE OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS

9 N.Y.C.R.R. § 465.6 Investigations

"(a) Investigation

After the filing of a complaint, the regional director of the division office in which it was filed, or to which it has been transferred, shall make, with the assistance of staff, a prompt and fair investigation of the allegations of the complaint.

(b) Methods

Such investigation may be made by field visit, written or oral inquiry, conference, or any other method or combination thereof deemed suitable in the discretion of the regional director or the director of regional affiars.

(c) Rebuttal

The complainant shall have an opportunity to rebut evidence submitted by or obtained from the respondent, before any determination dismissing a complaint for no probable cause is made by the regional director."

9 N.Y.C.R.R. § 465.12(c) Application for a subpoena. Subpoenas and subpoenas duces tecum may be issued by the designated division officers and employees upon the application of a party or party's attorney. Issuance of a subpoena *duces tecum* at the instance of a party who appears without attorney shall depend upon a showing of necessity.

KREMER NYHRD COMPLAINT, ENCL. 1
TO KREMER LETTER OF JUNE 15, 1978,
ATTACHMENT 3 TO COMPLAINT

STATE OF NEW YORK –
DIVISION OF HUMAN RIGHTS
COMPLAINANT'S INFORMATION SHEET
_____ REGIONAL OFFICE

COMPLAINANT:

RESPONDENT:

I, /s/Rubin Kremer, the complainant in the above matter acknowledge the following:

____1. I have been advised that according to the Division's Rules of Practice:

a. The Division or I shall be able to reasonably amend my complaint;
b. This complaint may be withdrawn by me at any time before the service of a Notice of Public Hearing
c. Upon my application, or on his own motion, the Commissioner may reopen the proceedings after this matter has been closed
d. If this matter is conciliated, I will be given fifteen days in which to agree to or object to the terms of conciliation
e. I may be present and shall be allowed to present testimony in person or by counsel and cross-examine witnesses in a Public Hearing on this matter.

____2. I have been informed that a copy of my complaint and/or the determination in this matter will be sent to _____, The local human rights commission, or referral agency of my choice.

____3. I have been informed of my right to retain private counsel.

____4. a. I understand that I, or my attorney, may review the Division's file in this matter.

b. I also understand that I, or my attorney, may copy by hand any material in the file.

____5. I am to notify the Regional Office of the Division of any change in my address, telephone number, or place of employment which may occur during the course of the Division's handling of this matter.

____6. Except for emergency situations, I shall give the Division's Regional Office four days' notice in the event that I cannot attend any scheduled conference at which my presence has been requested.

____7. I acknowledge receipt of a copy of the complaint in the above entitled matter.

Date: May 25, 1976

/s/Rubin Kremer
Complainant's Signature

KREMER LETTER OF JUNE 15, 1978, ATTACHMENT 3 TO COMPLAINT

Rubin Kremer
c/o R. Garkawe
2120 Wallace Ave., 2B
Bronx, New York, N.Y. 10462
Tel.: [212]-892-1322

June 15, 1978

Equal Employment Opportunity Commission
New York District Office
90 Church Street, Room 1301
New York, N.Y. 10007

Mr. Arthur W. Stern
District Director

Charge No.: TNY 6 - 1526
021 - 76 - 1526
Re: Chemical Construction Corporation

Dear Mr. Stern:

I would like to ask you to reconsider and to annul the Determination of the EEOC dated May 11, 1978, and to reopen this case on the grounds that the foundings and proceder was not impartial.

1. On May 20, 1976 based on the instructions in your letter of May 7, 1976, I filed a formal complaint with the Division of Human Rights of the Executive Department of the State of New York [Encl. No.1] alleging that Chemical Constr. Corporation unlawfully discriminated against me by laying me off without reason, and by refusing to reemploy me as a piping analytical engineer because of my religion and age, in violating of Section 296 of the Human Rights Law of the State of New York.

2. After the filing of the complaint on May 20, 1976 the following proceeding ensued:

   The Conference arranged by the Human Rights Division at 270 Broadway, on August 12, 1976 [Encl. No.2] for

Conference and Production of Records in the New York State H.R.D. did not take place. It was cancelled by the Field Representative of the H.R.D., Ms. Martha Garland.

3. On August 24, 1976 a review of the Exhibits presented by the respondent and prepared by Mr. Don Steenland Personnel Director of Chemico, conducted before Martha Garland, a Field Representative of the H.R.D. took place [Encl. No.8].

   I verbally refuted all the respondents statements entirely and demonstrated with documents that they are untrue and false [Extr. No.11, Exh.A, Extr. No.6].

   The field representative failed to include in her "Complainant's Rebuttal" [Extr. No.1] the basic information surrounding my termination, e.g. the people hired and rehired in August 1975 in Dept. 153 of CPPC after my termination namely:

   — Mr. Parish Shah on August 8, 1975
   — Mr. Navin Shah on August 10, 1975
   — Mr. Tapan Banerjee about August 23, 1975

   [See also Affidavid of May 6, 1975, File- TNY 6 1526, I was the only person not rehired].

   and the names of employees I worked with in order to proof my performance rating, namely:

   A. Mr. Answat Tankasali — Proj. Engineer
      Mr. Robert Tucker — Proj. Manager
      Job - 1964 Sulfuric Acid Plant for Hecla Mining Corp.

   B. Mr. Roy Ostrom — Proj. Engineer
      Mr. J.V. Bermudez — Proj. Manager
      Job - 1975, Gas part of Sulfuric Acid for Phelps and Dodge.

   C. Mr. Frank Severino — Proj. Engineer
      Mr. Farina — Proj. Manager
      Job - 2001 Sulfuric Acid plant for Korea

D. Mr. James Puc — Supervisor
- Proposal of Ammonia Plant for USSR.
- Review of the USSR Ammonia Job 2008, performed by Norman Razfar and Karl Hou, where I found over 50% errors except unsolved problems. All accepted by Mr. Puc.
- Comparision of three 1500 ton Ammonia plants, built by Chemico to proove the USSR job.

E. Mr. Robert Wendel — Proj. Engineer
Mr. L. Livolsi — Proj. Manager
Job - 2014, Relocation of Ammonia Plant

F. Mr. Michael Kramer — Proj. Engineer of Coalcon
Mr. Robert Tucker — Proj. Manager
Coal Gasification, where I worked before I was laid off, being in the midle of the job, assigned by Mr. E.V. Paul.

During this review Ms. M. Garland urged me "Read faster I have to go for lunch".

Respondent did not attend this review.

BASIS for NO PROBABLE CAUSE [EXTR. NO.2]
by Martha L. Garland, October 6, 1976,

1. "Investigation revealed complainant was laid off on August 1, 1975 from the Process Analytical Engineering Department *along with 14 other employees in his Department*".

   Comment:

   a. - There was no Process Analytical Engineering Dept. on August 1, 1975.
   Reference: Performance Rating by E.V. Paul dated July 29, 1975 [Extr. No.6 and Extr. No.5].

   b. - Mr. Jamez Puc, former supervisor of Dept. 153, in his opinion of May 27, 1976 [Extr.No.4] stated: *"Mr. Kremer was let go along with two other engineers* B.R. Kumar and Navin Shah" *not along with 14 employees in the Department as Ms. Martha*

Garland contendet. Departments 200, 240, and 242 were Drafting Depts. and had a separate Management [Extr.No.5,Extr.No.6]

2. "Investigation revealed ....."
   Comment: I was hired at age over 50. There was a different Management.

3. "Investigation revealed that complainant was the only Jewish employee in his Department, however, respondents Company presently [1976] has 25 Jewish people on the payroll which represents 13% of Chem. Constr. Corp. work force".
   Comment: At the time I worked, Chemico employed over 800 people. The alleged twenty five [25] Jewish Employees of 800 is only about 3%. To my knoledge no Jewish employee has been hired since August 1, 1975. The alleged 25 Jewish employees on the payroll [August, 1976] could not prevent *Mr. E. Paul's action to remove me from the Company on August 1, 1975 by giving me a "below average" performance rating on July 29, 1975 accepted by Chemico — Dr. Th. Gibian — President, and J.K. Coleman — V.P. of Personnel Relations [Extr.No.6,Encl.NO.3,Extr.No.5,Extr.No.7, Encl.No.6]. On June 19, 1975 my performance rating by E. Paul was "Hold for his knowledge and skills"* [Extr.No.8,Exh.D_3].

4. "Investigation revealed ....."
   No comment.

   The Basis for No Probable Cause by Ms. Martha Garland are untrue and tendentious [Extr.No.4, Extr.No.8-Exh.D_4,D_3].

   To my knowledge Ms. Martha Garland investigated sometime in January 77 several people e.g. E.Paul and M. Kramer from Coalcon. However, *there is no record in the file that this people were investigated,* instead there

is a note that she intendet to review Mr. N.Shah's file, but was unable to do so because the file was sent to New Orleans La.[Extr.No.9,Exh.N].

4. On November 9, 1976 I was investigated by Ms. Lillian Fennel, Regional Director of the Human Rights Division [Excl.No.7]. I submitted verbally to the Director all the information listed above. In addition I informed the Director, that to my knowledge Chemico signed the Anti-Jewish and Anti-Israeli Arab Boycott Agreement.

   After this investigation Ms. Fennel stated: "We are going to ask Chemico to send to us a list of employees hired from August 1, 1975 up to date. We will talk to the people you worked with in order to prove your performance rating. We would like to talk to the former Vice President of Engineering who hired you on June 25, 1973. We will ask the actual Vice President of Engineering Mr. L. Livolsi why you could not be rehired in August 1975. [I asked personally Mr. Livolsi on August 19, 20, and 21 for rehire. The answer was, "I am too short hear to rehire you", but was long enough to rehire and hire others. I worked on the 2014 Job and Mr. livolsi was at that time the Project Manager]. We will check your statement concerning the Anti-Jewish and Anti-Israeli Boycott in our Office, [H.R.D.]," and finally Ms. Fennel stated "You were fired because you are Jewish not because of your age".

   After the investigation I met Ms. Garland in the elevator, she stated "She [Ms. Fennel] gave me everything back. *There is no record in the file that this investigation took place.*

5. In a determination dated April 28, 1977 the State Division of H.R., by George C. Findlay, Regional Director dismissed my complaint on the grounds that, "The record shows that this complainant was not rehired by respondent employer because one employee with greater seniority was chosen. The other person that was rehired, filled a lesser position than that held by complainant".

See also point 6, 7, 8, 9, and 10 of my letter to Mr. Arthur W. Stern, District Director of EEOC, dated December 4, 1977, File No. TNY 6 - 1526. I was systematically refused to review the file.

6. NEW YORK STATE APPEAL BOARD. By notice dated May 10, 1977 I appealed the Human Rights Division determination to the State Human Rights Appeal Board. [Encl.No.11].

   After argument before the State Human Rights Appeal Board on September 16, 1977, by order dated November 25, 1977, the order appealed was affirmed.

   It should be noted that:

   — The Presiding Member Comm. R. Wong found that the file does not contain my brief to the Appeal Board dated May 10, 1977, and he could not read it before the hearing.

   — *The Appeal Board did not examine the wittnesses listed on page 5 of my brief dated May 10, 1977.*

   — *There is no record in the file containing the exchange of arguments between the parties.*

7. SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION: FIRST DEPARTMENT [Encl.No.12, No.13, No.14]

   Based on the Order of the State Human Rights Appeal Board - Appeal No. 4151, dated November 25, 1977 I appealed to the N.Y. State Supreme Court.

   By Petition dated December 5, 1977 I appealed to the Appellate Division of the New York State Supreme Court, praying to set aside the determination of the State Division of Human Rights and the order of the State Human Rights Appeal Board, and compelling Chemical Construction Corporation, to reinstate me as a piping analytical engineer or equal and to be awarded damages for the time I was unable to get a job.

By order dated February 27, 1978 [Encl.No.15] the determination of the State Division of Human Rights, and the order of the order of the State Human Rights Appeal Board was affirmed.

A review of the file 1877 [M-4560] in the Supreme Court on March 16, 1978 and on May 26, 1978 revealed:

— *There was newer a hearing of the parties before the N.Y. State Supreme Court on this matter as the order contends.*
Witness: Messr Layton and Sherman.

— There is no record in the file that a term of the Appellate Division of the Supreme Court took place.

— There is no copy or original of the order dated New York, February 27, 1978 in the file.

— The file does not contain the certified record of administrative proceedings submitted to the Supreme Court by the Office of General Councel to the State Division of Human Rights, dated December 15, 1977 by Alan J. Saks, Associate Attorney [Encl.No.16].

8. As the forgoing facts demonstrate, the Order of the New York State Appeal Board, dated November 25, 1977 and the Determination of the New York State H.R. Division, dated April 28, 1977 should be set aside so long as the findings and the order of the Division and the Board were arbitrary and not impartial.

Therefore I ask the Equal Employment Opportunity Commission the following:

1. To reconsider the Determination of the EEOC, dated May 11, 1978.
2. To reopen this case.
3. To examine the following witnesses in my presence in the order listed on page 8, 9, and 10.
4. To order me reinstated as a piping analytical engineer or equal.

5. To award damages for the time I was unable to get a job.

Sincerely,

/s/R.Kremer

Enclosures:

1. List of witnesses, page 8, 9, and 10.
2. List of enclosed documents, page 11.
3. To examine the following witnesses in my presence in the order listed on page
   1. Mr. Jamez Puc, former Supervisor of Dept. 153

      Barnard and Burk, Inc.
      200 Sheffield St.
      Moutainside, New Jersey 07092

      to prove:
      — that on July 28, 1975 I was assigned by E. Paul to work with Coalcon on the Coal Gasification Project.
      — that there was no lack of work in the piping analytical area in Dept. 153 on August 1, 1975
      — his statement concerned my performance rating and other remarks in his opinion of May 27, 1976 [Extr.No.4].
      — that in August 1975 the following people were hired in Dept. 153.
      Mr. Parish Shah
      Mr. Navin Shah
      Mr. Tapan Barnerjee

   2. Mr. E.V. Paul, former Superior of Depts 153, 241, and 242.

      Stone and Webster, Inc.
      One Penn Plaza
      New York, N.Y. 10001

to prove:
- that on July 28, 1975 Mr. E. Paul assigned me to work with Coalcon on the Coal Gasification Project, and that there was no lack of work.
- his statement concerned my "below average" performance rating on July 29, 1975 [Extr.No.6].

3. Mr. Carls, Vice President of Coalcon

Coalcon
One Penn Plaza
New York, N.Y. 10001

to prove:
- that on August 1, 1975 there was no lack of work in the piping analytical area on the Coal Gasification Project.
- that on July 31, 1975 Coalcon sent a list of employees to the Management of Chemico whom Coalcon wanted to continue their work, and that I was on this list.

4. Mr. L. Livolsi, former Vice President of Engineering

Nicholts Engineering
Princeton, New Jersey

- to explain why I could not be rehired in August 1975. In the same time three employees were hired in Dept. 153.
- to evaluate my performance rating while I was working on the Job-2014, Relocation of Ammonia Plant. Mr. Livolsi was the Project Manager of this Job.

5. Mr. J. Kevin Coleman, Vice President Employee Relations

Chemical Construction Corporation
One Penn Plaza
New York, N.Y. 10001
- to explain his statement in his letter dated September 15, 1975 [Encl.No.5], and his note to Dr. Gibian [Extr.No.7].

— to explain why I was laid off, despite that I was on the list which Coalcon sent to Chemico on July 31, 1975.

6. Dr. Thomas G. Gibian, former President of Chemico

Technical Guidance International, Inc.
475 Steamboat Road
Greenwich, CT 06830

— to explain the lay off and rehire criteria in August 1975.
— to explain his statement in his letter dated September 24, 1975 [Encl.No.6] in response to my letter dated August 22, 1975 [Encl.No.3]
— to disclose his investigation in September 1975 concerned my performance rating.

7. Mr. Don Steenland, Personnel Director

Chemical Construction Corporation
One Penn Plaza
New York, N.Y. 10001

to prove:
— the statements in the exhibits submitted to the New York Human Rights Division, 270 Broadway, dated August 11, 1976.
— his statement in his letter to the N.Y.H.R.D. dated September 17, 1976 [Extr.No.4]

8. Mr. Parish Shah, Employee of Dept. 153

Pullman Kellogg
433 Hackensack Ave.
Hackensack, N.J. 07601

— to prove that he was hired in August, 1975 in Dept. 153 of CPPC and to disclose the circumstances of his hiring.

9. Mr. Tapan Barnerjee, Employee of CPPC

   Pullman Kellogg
   433 Hackensack Ave.
   Hackensack, N.J. 07601

   to prove that he was hired in August, 1975 in Dept. 153 of CPPC, and to disclose the circumstances of his hiring.

10. Mr. Navin Shah, Employee of Dept. 153

    Chemical Construction Corporation
    One Penn Plaza
    New York, N.Y. 10001

    to prove that he was rehired [his lay off was cancelled] in Dept. 153 in August, 1975 an the circumstances of his rehire.

11. Mr. Krishma Raj, Employee of Dept. 241

    Chemical Construction Corporation
    One Penn Plaza
    New York, N.Y. 10001

    to prove that he was rehired [his lay off was cancelled] in Dept. 241 of CPPC in August, 1975 and the circumstances of his rehire.

12. Ms. Audrey Charrow, former Personnel Employee of CPPC

    Envirotech
    Chemico Air Pollution Controll
    One Penn Plaza
    New York, N.Y. 10001

    to disclose the basic circumstances surrounding the rehiring of the Employees listed in points 8, 9, 10, 11.

List of enclosed documents.

1. Encl. No.1 — Complaint, N.Y.S.H.R.D.
2. Encl. No.2 — Notice of Conference, H.R.D. August 12, 1976
3. Encl. No.3 — Letter of August 22, 1975, Chemico
4. Encl. No.4 — Letter of September 5, 1975, Chemico
5. Encl. No.5 — Letter of September 15, 1975, Chemico
6. Encl. No.6 — Letter of September 24, 1975, Chemico
7. Encl. No.7 — Message from N.Y.S.H.R.D., dated 10/27/76
8. Encl. No.8 — Letter from the H.R.D., dated August 18, 1976
9. Encl. No.9 — Letter to the H.R.D., dated February 25, 1977
10. Encl. No.10 — Letter to the H.R.D., dated May 3, 1977
11. Encl. No.11 — Letter to the State H.R. Appeal Board, May 10, 77
12. Encl No.12 — Petition to the N.Y.S. Supreme, December 5, 1977
13. Encl. No.13 — Memo of Law in Opposition to Petitioner, Dec. 21, 1977
14. Encl. No.14 — Reply to Respondents Memo of Law, Dec. 28, 1977
15. Encl. No.15 — Order of the Supreme Court, February 27, 1978
16. Encl. No.16 — Letter of the S.D.H.R. to the Supreme Court, 12/15/7
17. Encl. No.17 — Letter of June 10, 1976, Chemico
18. Extr. no.1 — Rebuttal
19. Extr. No.2 — Basis for No Probable Cause, October 6, 1976
20. Extr. No.4 — Exh.L, Exh.D_1
21. Extr. No.5 — Interoffice Correspondence - Chemico, June 17, 1974
22. Extr. No.6 — Performance Rating, Piping Engineering, 7/29/75
23. Extr. No.7 — Note from K.J. Coleman to T.G. Gibian, September 15, 197
24. Extr. No.8 — Exh.C, Exh.D_2, Exh.D_3, Exh.D_4.

25. Extr. No.9 — Exh.N, Exh.L
26. Extr. No.10 — Exh.F, Exh.I
27. Extr. No.11 — Exh.A
28. Extr. No.12 — Answers to Complainants Allegation, August 11, 1976

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No. 80-6045

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

RUBIN KREMER,

Petitioner,

v.

CHEMICAL CONSTRUCTION CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

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The fundamental issue in this case is a question of statutory interpretation: In enacting Title VII, what did Congress intend that a Federal court hearing a Title VII action should give to the prior decision of a state appellate court that was limited to reviewing a state agency determination under an arbitrary and capricious standard. The language, structure and intent of Title VII, particularly as specifically interpreted by this Court, compel the conclusion that Congress cannot possibly have intended such limited state court review of an administrative decision entirely to foreclose a Title VII action.

As we demonstrated in our opening brief, this Court has concluded repeatedly, after extensive analysis of the legislative history of Title VII, that Congress intended to grant

plaintiffs the right to a trial *de novo* in Federal court. *See New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980); *Chandler v. Roudebush*, 425 U.S. 840 (1976); *Alexander v. Garnder-Denver Co.*, 415 U.S. 36 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). While respondent attempts to distinguish these cases on the narrow ground that they did not decide the precise question presented here (Resp. Brief at 38-39), the fact is that they thoroughly considered Congress' intent and their analysis of it cannot be squared with respondent's view of Title VII.

Apart from the Second Circuit, every court of appeals that has considered the question has rejected respondent's view.* In addition to these cases cited in our opening brief (Pet. Brief at 13 n.11), the Seventh and Ninth Circuits, specifically relying on *Alexander v. Garnder-Denver Co., supra*, recently have also "soundly rejected" the position of the court of appeals in this case. *Unger v. Consolidated Foods Corp.*, 657 F.2d 909, 913-14 and n.5 (7th Cir. 1981); *Aleem v. General Felt Industries, Inc.*, slip op. 5587 (9th Cir., November 12, 1981).

*Moreover, the Second Circuit has not set forth the basis for its position on the issue. In this case, it cited *Sinicropi v. Nassau County*, 603 F.2d 60 (2nd. Cir.), *cert. denied* 444 U.S. 983 (1979), and in *Sinicropi*, it followed *Mitchell v. National Broadcasting Co.*, 553 F.2d 265 (2nd. Cir. 1977), with no explanation (the question not having been briefed by either side) of why the rules of preclusion applicable to claims under 42 U.S.C. §1981 should be extended to Title VII actions.

I.

CONTRARY TO RESPONDENT'S CONTENTIONS, CONGRESS NEVER INTENDED THAT STATE PROCEEDINGS WOULD HAVE PRECLUSIVE EFFECT UPON TITLE VII LITIGATION IN THE FEDERAL COURTS

When Congress enacted Title VII, it knew that some states and localities had antidiscrimination procedures and some had none at all. Some of these procedures included resort to state courts either to review administrative determinations, as does New York's, or to prosecute "criminal proceedings", 42 U.S.C. §2000e-5(c). With this background, Congress expresssly provided that in proceedings before the EEOC, "final findings and orders made by state and local authorities" are to be accorded "substantial weight", not preclusive effect. 42 U.S.C. §2000e-5(b). This Court has ruled that under Title VII, "[p]rior administrative findings made with respect to an employment discrimination claim may, of course, be admitted as evidence at a . . .trial *de novo*. See Fed. Rule Evid. 803(8)(C). *Cf. Alexander v. Garnder-Denver Co.*, 415

U.S. 36, 60 n.21". *Chandler v. Roudebush, supra*, 425 U.S. at 863 n.39.* In *Alexander*, this Court instructed that a prior decision on a discrimination claim (there by a labor arbitrator) "may be admitted as evidence and accorded such weight as the court deems appropriate". 415 U.S. at 60. In footnote 21 of *Alexander*, cited in *Chandler*, the Court went on to specify the factors that should be taken into account in determining the "appropriate" weight. Lower Federal courts have consistently applied this standard to state determinations, both administrative and judicial.**

Congress and this Court have thus determined that, in Title VII actions, prior state proceedings are to be given "substantial" weight before the EEOC and "such weight as the court deems appropriate" before a Federal court. Respondent argues however, that these principles should be disregarded and the state court judgement should instead be given totally preclusive effect by operation of 28 U.S.C. §1738.

*The fact that, as respondent argues (Resp. Brief at 38), *Chandler* involved a Federal court proceeding following an adjudication by a Federal administrative agency (the Veterans Administration as affirmed by the Civil Service Commission Appeals Board, 425 U.S. at 842, not the EEOC as respondent inaccurately asserts) does not affect the import of the Court's holding. Clearly, there was no reason for Congress to require greater deference to a state agency determination than to a Federal Agency decision when it granted Federal jurisdiction over Title VII claims.

**See, e.g., *Unger v. Consolidated Foods Corp.*, *supra*, 657 F.2d at 914-15; *Smouse v. General Electric Co.*, 626 F.2d 333, 335 (3rd. Cir. 1980); *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079, 1084-85 (8th Cir.), *cert. denied* 446 U.S. 966 (1980); *Batiste v. Furnco Construction Corp.*, 503 F.2d 447, 451 (7th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975), *Cooper v. Phillip Morris, Inc.*, 464 F.2d 9, 12 (6th Cir. 1972).

Congress intended no such result. Section 1738 was enacted by the First Congress in 1790 to provide that the new Federal courts would give full faith and credit to state court judgments. *See Allen v. McCurry*, 449 U.S. 90, 96 (1980). The statute codified common law principles of res judicata. The fact that Congress and this Court, almost two centuries later, as part of a complex statutory scheme dealing solely with employment discrimination, determined that the EEOC and the Federal courts should give evidentiary "weight", but not preclusive effect, to state determinations is no more an "implied repeal" of section 1738 (*see* Resp. Brief at 26-27) than is the venue provision of Title VII, 42 U.S.C. §2000e-5(f)(3), and "implied repeal" of differing provisions of the general venue statute, 28 U.S.C. §1391. When Congress creates a special statutory procedure to deal with a particular problem, it frequently changes the general rules of civil practice that would otherwise apply. There is not an inconsistency; there is simply a new, precisely articulated, "unique statutory structure", *Unger v. Consolidated Foods Corp.*, *supra*, 657 F.2d at 914 n.5, to be applied on its own terms.*

How respondent's proposed construction of Title VII would significantly undermine the remedial provisions central

*In *Chandler v. Roudebush*, *supra*, where the question presented was whether a Federal employee had the right to a trial *de novo* after her claim had been rejected by a Federal agency, respondent by the same "implied repeal" logic would have argued that Title VII "repealed" the agency review provisions of the Administrative Procedure Act. But this Court did not even consider the question in those terms. It simply looked to the "language of the statute", 425 U.S. at 843, and its legislative history—as we are urging it to do here. *See Newsom v. Vanderbilt University*, 653 F.2d 1100, 1107-08 (6th Cir. 1981) (citing *Chandler* for proposition that APA "does not prevent the court form engaging in *de novo* review where the language of the statute or the legislative history authorize a trial *de novo*").

to the enforcement of the statute can be shown in several ways. As the EEOC points out, respondent's argument leads to the anomalous result that the Federal courts would be precluded from considering Title VII claims where there had been a state court appeal, but the EEOC would not be. (Amicus Brief of the United States and EEOC at 11-12.) Of course, such a construction would render EEOC consideration of the claim "meaningless", since the employer, knowing that the EEOC had no enforcement powers and that the Federal court could not grant relief, would have no incentive to join in conciliation efforts. (*Id.*)

Moreover, respondent overlooks the fact that companion general provisions of Title 28 require Federal courts to give full faith and credit not only to state *judicial* determinations, but to state *administrative* determinations as well. In language paralleling that of section 1738, 28 U.S.C. § 1739 provides that:

> "All nonjudicial records or books kept in any public office of any State . . .shall have the same full faith and credit in every court and office within the United States. . .as they have by law or usage in the courts or offices of the State."*

In most states, statutory or common law preclusion doctrines would "by law or usage" bar any attempt to bring a second state antidiscrimination proceeding based on a claim that had been previously determined in an administrative proceeding.

*The statute that has become section 1739 was originally enacted in 1804, in essentially the same form, as part of legislation that also re-enacted the predecessor of section 1738. Act of March 27, 1804, ch. 56, 2 Stat. 298. *See Allen v. McCurry, supra*, 449 U.S. at 96 n.8. Sections 1738 and 1739 were first codified as sections 905 and 906, respectively, of the Revised Statutes. 18 Stat. 171 (1878).

See, e.g., N.Y. Exec. Law § § 297(9), 300 (McKinney Supp. 1972-80). Under the general full faith and credit provisions of Title 28, a Federal court would, according to respondent's logic, then be bound to apply such state preclusion rules to dismiss any Title VII claim based on a grievance that was previously submitted to a state agency. Because Title VII requires complainants to resort to state administrative procedures before going to the EEOC or Federal court, respondent's approach would render the right to a trial *de novo* a nullity in any state that has such procedures.

Thus, respondent's notion of how Title VII and the general full faith and credit statutes must be "read together" would effectively eliminate Federal enforcement of private Title VII claims. Nothing could be further from the legislative intent: "Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims." *Alexander v. Gardner-Denver Co., supra*, 415 U.S. at 60 n.21.

The effect of the decision below is to give a state administrative agency the final power to determine a complainant's substantive Federal statutory rights. Yet this Court has specifically recognized that the legislative history of the 1972 amendments to Title VII reveals "a thorough and meticulous consideration of the question whether an administrative agency or a court should be given primary adjudicative responsibility for particular categories of Title VII complaints." *Chandler v. Roudebush, supra*, 425 U.S. at 853-54. The final decision, of course, was to reject the bills that would have "v est[ed] in an administrative agency rather than in the federal courts the primary adjudicative responsibility", and to provide instead for a "judicial trial *de novo* for private as well as federal employees", *Id.* at 853, 857-

58.* Thus, respondent's reading of Title VII, by effectively vesting "primary adjudicative responsibility" for employment discrimination claims in state agencies, directly contravenes Congress' intention to reject giving any administrative body "primary adjudicative responsibility", *See also* Pet. Brief at 15.**

*Among the proposals rejected by Congress in 1972 were bills that would have given "primary adjudicative responsibility" for private-sector discrimination complaints to the EEOC, and, for discrimination complaints by Federal government employees, to the employing agency, subject in either case to review by the courts of appeals under the Administrative Procedure Act. *Id.*

**In the face of this Court's previous extensive analysis of the legislative history of the *de novo* trial right, respondent plucks from context statement of Senator Javits during the debates on the 1972 amendments to Title VII which it reads to suggest that res judicata might apply in the present case. (Resp. Brief at 35-36; *see also* Amicus Brief of Equal Employment Opportunity Council at 7, 13-15.) A reading of the entire debate makes it clear, however, that Senator Hruska, to whom Senator Javits was responding, while expressing a general desire to reduce duplicative litigation of discrimination claims, had actually focused his concern not on state proceedings, but on the prospect of repeated suits under various other Federal laws that might also prohibit the alleged discrimination.

Among the laws enforced in "half a dozen forums" that Senator Hruska mentioned were the National Labor Relations Act (both as an unfair labor practice and a breach of duty of fair representation), the Equal Pay Act, the Age Discrimination Act, 42 U.S.C. §1981, statutes prohibiting discrimination by Federal contractors, and so forth. 118 Cong. Rec. 3368-69 (1972). But Senator Hruska specifically excluded state proceedings from the amendment that he proposed to make Title VII an exclusive remedy:

> "Then there would be a further exception and that would be proceedings in a State agency. Those proceedings could continue notwithstanding the pendency of an employee's action under section 706 of Title VII. It seems to me and others that this is only fair." 118 Cong. Rec. 3369.

Continued

That Congressional intent was given effect in *New York Gaslight Club, Inc. v. Carey, supra*, where this Court considered "the propriety of EEOC's issuance of the right to sue letter" during the pendency of state proceedings, 447 U.S. at 735 n.5. The right to sue letter is, of course, an essential prerequisite to bringing a Federal court action. The Court ruled that "the Commission was required to issue the letter after 180 days, regardless of the posture of any state proceedings". *Id.*

It follows that a Title VII action may be brought "regardless of the posture of any state proceedings" because the EEOC's duty to issue a right to sue letter would be meaningless (and the time of the Commission, the court and the parties utterly wasted) if a subsequent adverse decision in the state proceedings could have preclusive effect in a pending Federal court action. Once the case is before the Federal court, it has power to afford relief, otherwise available under Title VII, that has not been granted by the state. *New York Gaslight Club, Inc. v. Carey, supra.* In this case, where the "state proceedings" gave no relief, the Federal court has power to grant petitioner the full panoply of Title VII remedies; it cannot dismiss his case without reaching the merits.

Continued from previous page

Thus, Senator Javits' comments, which contain no mention of state administrative proceedings or judicial review thereof, should in context also be read as excluding state proceedings from any application of res judicata in Title VII suits. *See also* H.R. Rep. No. 92-238, 92nd Cong., 2nd. Sess., 1972 U.S. Code Cong. & Ad. News 2137, 2175 (minority report) (criticizing possibility of multiple suits "brought under prior existing federal statutes such as the National Labor Relations Act and the Civil Rights Act of 1866").

In sum, by enacting Title VII, Congress could not have intended to establish a three-tiered structure to review anti-discrimination claims—first, by state proceedings, second, in the EEOC, and third, in the Federal district courts—while at the same time providing that once a decision is made in the first stage of the process, it has conclusive effect thereafter.

II.

THE NEW YORK STATE PROCEDURES FOR DECIDING EMPLOYMENT DISCRIMINATION CLAIMS DO NOT FULFILL THE REQUIREMENTS FOR THE TRIAL DE NOVO INTENDED BY CONGRESS

Even if it is assumed that Title VII does not grant complaints the absolute right to a trial *de novo* in Federal court in all circumstances, it is clear that the New York State procedures for resolving employment discrimination claims that were followed here are not the equivalent of the trial *de novo* to which petitioner is entitled. Setting up a straw man, respondent claims that petitioner has called "into question the fairness of the state procedures" (Resp. Brief at 16), and it proceeds at length to argue that those procedures are fair on their face (Resp. Brief at 13-26). But petitioner has never claimed otherwise. Rather, we make two points with respect to the state proceedings.

First, whatever the procedural rights that may be available in some cases, the NYHRD dismissed this case by entering "skeletal and incomplete findings" of a "conclusory" nature

(U.S. Amicus Brief at 2 n.3, 17),* without holding a hearing, without petitioner being able to confront or cross-examine respondent or other witnesses,** without calling any witness other than petitioner, and without making a formal record. In these circumstances, whatever "opportunity" petitioner had for a "full and fair hearing" was not realized, and even under the traditional doctrine of collateral estoppel he would not be bound in the later proceeding. *Montana v. United States*, 440 U.S. 147, 164 n.11 (1979).

Second, whether or not the state administrative procedures were "full and fair", they are simply not equivalent to those in a Federal district court. This does not mean, as respondent implies, that we argue they are unconstitutional (Resp. Br. at 23). Rather, it is further evidence that such procedures do not

*See J.A. 13. Moreover, as the district court noted, even the decision that was entered mentioned only Chemico's failure to rehire petitioner. There was no finding or conclusion with respect to his claim that his initial discharge was illegal. J.A. 45; 464 F.Supp. 468, 471 (S.D.N.Y. 1978) (Pierce, J.).

**Respondent points out that petitioner "had the right to request the NYHRD to issue subpoenas". (Resp. Brief at 22.) What respondent does not say is that the NYHRD notice did not inform petitioner of this right (*see* S.A. 1), that under NYHRD regulations that it cites a *pro se* complainant is required to make "a showing of necessity" to obtain a subpoena (S.A. 64), and that, in any event:

> "This power [of NYHRD] to issue subpoenas . . .was designed to make evidence available at a hearing on the merits . . . If the division requires preliminary information obtainable by subpoena, the statute provides it with that authority, but before the hearing stage the division should be free to work its will without interference by the complainant's private attorney, and the complainant is not permitted to use the subpoena power as a discovery device." *State Division of Human Rights v. University of Rochester*, 53 A.D.2d 1020, 386 N.Y.S.2d 147 (4th Dep't 1976).

meet the Congressional directive that a trial *de novo*, in which "both parties are entitled to an inquiry by a court into the charges", *Blizard v. Fielding*, 572 F.2d 13, 16 (1st Cir. 1978), is required in Title VII cases.*

The fact that the NYHRD decision was "confirmed" by the Appellate Division under an "arbitrary and capricious" standard of review does not mean that the state procedure is entitled to preclusive effect under Title VII. Because the Appellate Division operates under a limited standard of review in appeals of discrimination claims, it cannot exercise "primary adjudicative responsibility" for such claims. Yet as we have shown above, Congress in Title VII "chose to permit *de novo* judicial trial . . .rather than mere judicial review" of agency discriminations. *Chandler v. Roudebush, supra*, 425 U.S. at 852. In contrast to the situation in *Allen v. McCurry*,

*As those members of Congress who successfully advocated a trial *de novo* in 1972 argued:

> "The appropriate forum to resolve civil rights questions, questions of employment discrimination . . ., is a court. Civil rights issues usually arouse strong emotions. United States district court proceedings provide procedural safeguards; Federal judges are well known in their areas and enjoy great respect; the forum is convenient for the litigants and is impartial; the proceedings are public, and the judge has power to resolve the problem and fashion a complete remedy.
>
> "The district court approach has a great advantage over an administrative hearing procedure in securing the needed evidence. Experience has shown that investigations, which are aimed simply at developing enough evidence to find reasonable cause, fall short of providing adequate evidence for obtaining a decision where the standard, as it is in the courts, is a preponderance of evidence on the record." H.R. Rep. No. 92-238, *supra*, 1972 U.S. Code Cong. & Admin. News at 2172 (minority report).

supra, where the state court had held a full adversarial evidentiary hearing on the precise Federal Fourth Amendment claim that the plaintiff was precluded form relitigating in Federal court, in this case the state court has not found any facts nor conducted any evidentiary hearing on the Federal issue.* Mr. Kremer is not seeking what respondent characterizes as his "second bite at the apple" (Resp. Brief at 30) of judicial fact-finding, but his first.

III.

CONGRESS INTENDED LIMITED DUPLICATION OF STATE AND FEDERAL ENFORCEMENT OF ANTIDISCRIMINATION STATUTES

Respondent brushes aside the fact that, if the decision below stands, it will "ensure that almost all Title VII

*Obviously, we are not making the abstract claim, implied by respondent, that the state judicial system is any less suited for resolving the merits of discrimination claims than the Federal courts. The decision to grant the right to a Federal forum was made by Congress. And, the state court decision was not on the merits of petitioner's claim because, as in the case of judicial review of an artibrator's ruling, "[t]he court cannot review the merits of the . . .decision", *Aleem v. General Felt Industries, Inc.*, *supra*, slip op. at 5590, except under the arbitrary and capricious standard.

Allen v. McCurry, *supra*, is also distinguishable in this case because it was an action brought under 42 U.S.C. §1983. As the Seventh Circuit has held, reliance on *Allen v. McCurry* is "misplaced" because "the statutory and congressional history" of section 1983, "in in direct contrast to the abundant statutory and legislative evidence that Title VII envisions a dual federal and state enforcement scheme culminating in an independent right to a trial *de novo* in federal court." *Unger v. Consolidated Foods, Inc.*, *supra*, 657 F.2d at 914 n.5.

complaintants would abandon state proceedings as soon as possible", *New York Gaslight Club, Inc. v. Carey*, *supra*, 447 U.S. at 66 n.6, to avoid any risk of losing their right to a Federal court trial *de novo*. Yet this Court has expressed particular concern lest "the existence of an incentive to get into federal court . . . undermine Congress' intent to encourage full use of state remedies". *Id. Cf. Alexander v. Gardner-Denver Co.*, *supra*, 415 U.S. at 59. Finally, to the extent that granting trials *de novo* results in duplicative state and federal enforcement efforts or increased burdens on employers, "Congress has made the choice". *Chandler v. Roudebush*, *supra*, 425 U.S. at 864.

CONCLUSION

For the reasons discussed above, in the Brief of Petitioner and in the Amicus Brief for the United States and the Equal Employment Opportunity Commission, the judgment of the Court of Appeals should be reversed and the case remanded for trial.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-6045

RUBIN KREMER,

Petitioner,

v.

CHEMICAL CONSTRUCTION CORPORATION,

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENT

The Equal Employment Advisory Council (EEAC), with the written consent of the parties,[1] respectfully submits this brief as Amicus Curiae in support of the Respondent, Chemical Construction Corporation.

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[1] Their consents have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity (EEO) whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members, or their constituents, are subject to a variety of federal statutes that prohibit discrimination in employment, including Title VII of the Civil Rights Act of 1964, *as amended* (42 U.S.C. §§ 2000e *et seq.*) (1976), the Equal Pay Provisions of the Fair Labor Standards Act, 29 U.S.C. § 206(d)(1) (1976), the Age Discrimination in Employment Act of 1967, *as amended*, 29 U.S.C. § 623 (1976), and the Reconstruction Era Civil Rights Act, 42 U.S.C. § 1981 (1976). Still further, EEAC's members are typically subject to comprehensive fair employment laws enacted by the vast majority of states of the Union. *See generally* J. Champagne & J. Lerner, Equal Employment Opportunities Under Federal and State Laws: A Guide to Laws and Orders Prohibiting Discrimination in Employment (1973). As such, EEAC's members have a direct interest in the issue presented for the

Court's consideration: that is, whether a state court judgment adverse to plaintiff's state employment discrimination claim bars his subsequent Title VII action on the same claim in federal court.[2]

At issue in this case is the extent to which doctrines of prior adjudication and 28 U.S.C. § 1738 limit the duplication of successive court actions alleging employment discrimination brought on behalf of the same plaintiff. The Second Circuit has indicated in the circumstances of this case that state judicial proceedings initiated by the plaintiff and brought to final resolution in state court are sufficient to foreclose later federal Title VII suit on the same claim. Because of the impact in cost upon employers and the effects upon the use of scarce judicial resources caused by the successive prosecution of the same claims of employment discrimination, the Court's disposition of this case is of vital concern to parties in EEO litigation and to the federal and state judiciary.

STATEMENT OF THE CASE

Petitioner filed a discrimination charge with EEOC in May 1976, claiming that he had been laid off and not rehired on the basis of his religion and national

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[2] EEAC has filed briefs as Amicus Curiae with this Court and other courts in cases that raise important issues concerning the interrelationship of various statutory and regulatory EEO schemes. *See, e.g., I.U.E. Local 790 v. Robbins & Meyers,* 429 U.S. 229 (1976); *Great American Savings & Loan Ass'n v. Novotny,* 442 U.S. 366 (1979); *United States v. Trucking Management, Inc.,* 26 FEP Cases 809 (D.C. Cir. 1981); *United States v. East Texas Motor Freight System,* 564 F.2d 179 (5th Cir. 1977).

origin. J.A. 5.[3] In accordance with Title VII procedures, his complaint was referred to the state deferral agency, the New York State Division of Human Rights (NYHRD). After an investigation which included an examination of documents submitted by the employer and three interviews with the petitioner, the NYHRD issued a Determination that there was no probable cause to believe the employer had engaged in the discriminatory practice charged. J.A. 13. Petitioner appealed to the State Appeal Board on substantive and procedural grounds and argued his case both orally and in writing. The Appeal Board affirmed the determination of the NYHRD, and attached to its order a notice setting forth the aggrieved party's right to seek judicial review in the appropriate state appellate court. J.A. 15.

In December 1977, the petitioner sought judicial review in the Appellate Division of the New York Supreme Court. J.A. 23. In February 1978, the Appellate Division unanimously ordered that the determination of the Appeal Board be "and the same hereby is confirmed." J.A. 25, *reported in* 402 N.Y.S.2d 699 (1st Dept. 1978). The petitioner did not attempt to obtain review in New York's highest court, the Court of Appeals. In May 1978, the EEOC made a determination that there was not reasonable cause to believe that the charge of discrimination was true and thereupon issued a notice of right to sue in federal district court. J.A. 27.

Petitioner subsequently brought a Title VII action in the District Court for the Southern District of New York. The employer moved for dismissal or for

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[3] References to the Joint Appendix of the parties are cited as "J.A." followed by the appropriate page number.

summary judgment on the ground that the determination of the state Appellate Division constituted a bar under the reasoning of *Mitchell v. National Broadcasting Co.*, 553 F.2d 265 (2d Cir. 1977). There, a Second Circuit panel held that a state dismissal of a race discrimination claim operated as res judicata and barred a later action under 42 U.S.C. § 1981. Although the employer's motion to dismiss petitioner's federal suit initially was denied, J.A. 43, *reported in* 464 F. Supp. 468, a renewed motion to dismiss or for summary judgment subsequently was granted after the Second Circuit decided *Sinicropi v. Nassau County*, 601 F.2d 60, *cert. denied*, 444 U.S. 983 (1979), which applied the reasoning of *Mitchell* to a claim under Title VII and held that a state dismissal of a sex discrimination claim barred a later Title VII suit on the same facts. J.A. 55.

Appealing from the judgment of dismissal, petitioner sought reversal in the Second Circuit on the ground, among others, that *Sinicropi* was wrongly decided. Judge Friendly, expressing the views of a Second Circuit panel, ruled that the court would not overturn the decision of another panel rendered after a full consideration of the very point at issue. J.A. 69. Petitioner's subsequent motion for a rehearing *en banc* was denied. J.A. 80.

SUMMARY OF ARGUMENT

The federal courts traditionally have adhered to prior adjudication doctrines under which a final judgment on the merits of an action precludes the parties from relitigating issues that were or could have been raised in that action. *Allen v. McCurry*, 101 S. Ct. 411 (1980); *Cromwell v. County of Sac.*, 94 U.S. 351 (1877). The petitioner seeks to avoid

their presumptive application in this case on the grounds that Title VII guarantees him a federal court trial *de novo*, and that state proceedings in which his employment discrimination claim was adjudicated were inadequate. Neither of these contentions has merit. In view of Title VII's limited deferral mechanism to state agency proceedings, its legislative history unequivocally endorsing the application of res judicata, and the policy reasons favoring limitations on multiple suits, petitioner's presentation of his case in state agency proceedings, together with his voluntary pursuit of judicial review in the New York courts, should bar his subsequent Title VII suit in federal court on the same claim.

Title VII spells out in detail the complementary relationship of federal and state EEO enforcement mechanisms. Contrary to the petitioner's contentions, the statute plainly allows only that *initial resort to state administrative remedies* will not deprive the plaintiff of a right to a federal trial de novo on a Title VII claim. See *Chandler v. Roudebush*, 425 U.S. 840, 844-46 (1976). Although Congress anticipated redress of injuries sustained through employment discrimination in several possible forums, see *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47-49 (1974), and although Title VII permits actions by both EEOC and private grievants, *General Telephone Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318 (1980), nothing in tne statute so much as suggests that traditional notions of judicial preclusion were not meant to apply.

To the contrary, Title VII's legislative history explicitly acknowledges application of res judicata in

this kind of case. "Once there is a litigation," declared Senator Javits during debate on the Equal Employment Opportunity Act of 1972, "the remedy has been chosen and can be followed through and no relitigation of the same issues in a different forum would be permitted." 3 Legislative History of the Equal Employment Opportunity Act of 1972 1400-01. *Cf.* H.R. Rep. No. 238, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 2148. This Court should accord substantial weight to such unequivocal indication of congressional intent and approve the use of res judicata in this case.

This Court already has ruled that res judicata and collateral estoppel apply under Section 1983 of the federal Civil Rights Act. *Allen v. McCurry*, 101 S. Ct. 411 (1980); *Preiser v. Rodriguez*, 411 U.S. 475, 497 (1973). The reasons for applying these doctrines under Title VII are particularly compelling. The nation's employment discrimination laws have created an array of overlapping and competing remedies. Successive litigation of the same claims is inefficient, expensive and unnecessary to attain the goals of Title VII. Where, in a case like this, a plaintiff has chosen to appeal a state agency dismissal of his EEO claim through the state's appellate courts, "[t]he predicament in which [he] finds himself is of his own making" and this Court should not "upset the general and well-established doctrine of *res judicata*, conceived in the light of the maxim that the interest of the state requires that there be an end to litigation—a maxim which comports with common sense as well as public policy." *Reed v. Allen*, 286 U.S. 191, 198-99 (1932), *cited in Federated Department Stores, Inc., et al. v. Moitie*, 101 S. Ct. 2424, 2429 (1981).

ARGUMENT

THE PLAIN LANGUAGE OF TITLE VII, ITS LEGISLATIVE HISTORY, THE DECISIONS OF THIS COURT AND SIGNIFICANT POLICY CONSIDERATIONS ALL FAVOR THE APPLICATION OF JUDICIAL PRECLUSION IN THIS CASE

A. Title VII Contains No Implied or Expressed Restrictions on the Traditional Doctrines of Preclusion

Critical to this Court's recent decision concluding that collateral estoppel applied to actions brought under 42 U.S.C. § 1983 (the Civil Rights Act of 1871), *Allen v. McCurry*, 101 S. Ct. 411 (1980), was the observation that "nothing in the language of § 1983 remotely expresses any congressional intent to contravene the common law rules of preclusion or to repeal the express statutory requirements of the predecessor of 28 U.S.C. § 1738, ... *Id.* at 416.[4]

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[4] As this Court noted in *McCurry*, res judicata ("claim preclusion") and collateral estoppel ("issue preclusion") are judicial doctrines designed to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. 101 S. Ct. at 415. Because they also promote comity between state and federal courts, Congress incorporated their federal-state aspects into positive law shortly after ratification of the Constitution. *Id.* at 416 n.8. Accordingly, 28 U.S.C. § 1738 (1976) mandates that all federal courts give preclusive affect to state-court judgments whenever the courts of the State from which the judgments emerged would do so. The statute provides, in relevant part, that:

> "The . . . judicial proceedings of any court of any State . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts

The same may be said of Title VII, with the additional observation that because its statutory scheme explicitly makes detailed provision for state proceedings, the absence of limitations on the preclusion doctrines is more striking.

Title VII devotes substantial attention to the interrelationship of state and federal mechanisms for resolving employment discrimination disputes. Thus, under Section 706(e) an employment discrimination charge must be submitted either to the EEOC or an appropriate state agency ("706 agency") within 180 days of the occurrence of the alleged unlawful act. An additional 120 days within which to file with the EEOC is granted aggrieved individuals who make a timely filing with a state or local agency authorized to provide relief from such discrimination. The extended time period for grievants in jurisdictions with appropriate state and local agencies derives from the congressional intent that local authorities first have an opportunity to resolve the dispute. Indeed, Congress included an entire subsection, 706(c), that prohibits a charge from being filed with the EEOC before the expiration of sixty days after proceedings have been commenced before a 706 agency, unless such proceedings have been earlier terminated.

Contrary to petitioner's contentions, nothing in Title VII evidences a congressional intent to allow redundant litigation in order "to encourage full use of state antidiscrimination remedies." (Pet. Br. 25). Although Title VII envisions and promotes federal-

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of such state. . . ." 101 S. Ct. at 416, *also citing Huron Holding Corp. v. Lincoln Mine Operations*, 312 U.S. 183 (1941); *Davis v. Davis*, 305 U.S. 32 (1938).

state cooperation in EEO enforcement,[5] the deferral mechanism is fashioned specifically to give the state agency an initial opportunity only to process EEO claims. Neither the statute nor the decisions of this Court anticipate that complainants will pursue avenues of parallel relief through the state and federal judiciary. To the contrary, under Title VII state agencies are given merely "*a limited opportunity* to resolve problems of employment discrimination and thereby to make unnecessary resort to federal relief. . . ." *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755 (1979) (emphasis added). *See also Love v. Pullman Co.*, 404 U.S. 522, 526 (1972) (Title VII deferral agencies given a "prior opportunity to consider discrimination complaints. . . ." (emphasis added)). As this Court again recently declared: "Title VII explicitly leaves the States free, and indeed encourages them, to exercise their *regulatory powers* over discriminatory employment practices." *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 59 (1980).

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[5] In addition to the state deferral mechanism, "[o]ther provisions of Title VII also evidence the policy of promoting federal-state cooperation in enforcement." *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 64 n.4, *citing* § 706(b), as redesignated, 42 U.S.C. § 2000e-5(b) (EEOC required to "accord substantial weight" to a state administrative determination), and § 709(b), *as amended*, 42 U.S.C. § 2000e-8(b) (authorizing the EEOC to "cooperate with State and local agencies charged with the administration of State fair employment laws" in funding research and other mutually beneficial projects; and to enter into work-sharing agreements with those agencies to facilitate the processing of complaints). *All* of these provisions are directed toward administrative cooperation, however, and lend no evidence of congressional intent to compromise or circumscribe the validity of state *judicial* proceedings.

Similarly, the petitioner's emphasis upon Title VII's provision affording complainants a federal court trial de novo is overstated. (Pet. Br. 12)* It is *initial resort* to state administrative remedies that does not deprive the plaintiff of a right to a federal trial de novo on a Title VII claim. See *Chandler v. Roudebush*, 425 U.S. 840, 844-46 (1976). Hence, although neither a final arbitration under the non-discrimination clause of a collective-bargaining agreement, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), nor a Civil Service Commission adjudication of an employment discrimination claim, *Chandler v. Roudebush, supra*, will bar a complainant's similar first prayer for relief in court, nothing in Title VII

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* Title VII by its terms vests only "jurisdiction," not "exclusive jurisdiction," in federal district courts. 42 U.S.C. § 2000e-5(f)(3). As a general matter, state courts of general jurisdiction have the power to exercise jurisdiction over cases arising under the Constitution, laws or treaties of the United States unless this power is expressly taken away by Congress. *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 25-27 (1820); *Dowd Box Co. v. Courtney*, 368 U.S. 502, 508 (1962). Accordingly, several courts have concluded that state courts retain concurrent jurisdiction over Title VII claims. See *Peterson v. Eastern Airlines*, 20 FEP Cases 1322, 1323 (W.D. Tex. 1979); *Bennun v. Board of Governors of Rutgers*, 413 F. Supp. 1274, 1279 (D. N.J. 1976); *Williams v. Virginia Empl. Comm.*, 11 FEP Cases 232-233 (E.D. Va. 1975); *Vason v. Carrano*, 31 Conn. Supp. 338 330 A.2d 98 (1974); *Peper v. Princeton Univ. Bd. of Trustees*, 77 N.J. 55, 389 A.2d 465, 474-75 (1978). The question whether Title VII implicitly grants concurrent jurisdiction over Title VII claims to state courts, we submit, is not raised by this case and is unnecessary to its resolution. Were the Court to acknowledge the existence of concurrent jurisdiction under Title VII, of course, the reasons favoring the application of preclusion doctrines would stand out in even bolder relief.

warrants an exception to the rules of *judicial* preclusion.

B. The Legislative History of Title VII Explicitly Endorses The Application of Res Judicata

In *Allen v. McCurry*, 101 S. Ct. at 417, this Court looked to the legislative history of Section 1983 to determine whether Congress intended to repeal or restrict the traditional doctrines of preclusion. Section 1983 is *specifically designed* to afford civil rights complainants an opportunity for relief in federal court from alleged violation of federal rights under color of State law.[7] Moreover, this Court observed that "one strong motive" behind the statute's enactment was "grave congressional concern that the state courts had been deficient in protecting federal rights," 101 S. Ct. at 417, *citing Mitchum v. Foster*, 407 U.S. 225, 241-242 (1972) and *Monroe v. Pape*, 365 U.S. 167, 180 (1961). Nevertheless, this Court concluded that "where the state courts have recognized the constitutional claims asserted and provided fair procedures for determining them," collateral estoppel applied. In the view of this Court, the congressional concern for state court deficiency lent "only the most equivocal support to any argument that, . . . Congress intended to override § 1738 or the common law rules

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[7] For an application of res judicata in the context of Title VII and Section 1983, see *Harrington v. Vandalia-Butler Bd. of Education*, 25 FEP Cases 1257 (6th Cir. 1981). There the court of appeals held that a claimant, who in a previous suit demonstrated sex discrimination on the part of a school board under Title VII, was barred by the prior adjudication from asserting a claim under Section 1983 for damages unavailable under Title VII, based on the same set of operative facts.

of collateral estoppel and res judicata." 101 S. Ct. at 411. "Since repeals by implication are disfavored," this Court cautioned, "much clearer support than this would be required to hold that § 1738 and the traditional rules of preclusion are not applicable to § 1983 suits." *Id., citing Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976).

Title VII's legislative history is less equivocal than that of Section 1983. During Senate debate on legislation that ultimately culminated in the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, *amending* 42 U.S.C. § 2000e (1970), Senator Hruska of Nebraska introduced an amendment, the purpose of which was "to avoid the potential situation whereby a respondent is faced with the requirement to defend multiple actions arising from a single offense." 3 Legislative History of the Equal Employment Act of 1972 1400 (Hruska Memorandum, as read by Sen. Javits of New York) (hereinafter *Legislative History*). "Such multiplicity of suits," Senator Hruska warned, "could result in undue burdens in the gathering of evidence and trial expenses as well as harassment and even a form of blackmail." *Id.*

Senator Javits, ranking member of the Senate Committee on Labor and Public Welfare and the Senate Subcommittee on Labor,[8] opposed the amend-

[8] Senator Javits, a practicing lawyer since 1927, was a co-sponsor of legislation in the Senate that culminated in enactment of the 1972 amendments. He participated in Congressional debate on almost every topic concerning the Act. See 2 *Legislative History* VII-XVII. He was subsequently appointed a conferee on the part of the Senate. See *Legislative History* at 1797, 1799.

ment specifically on the ground that res judicata was available to prevent duplicate employment discrimination lawsuits:

> "[T]here is the real capability in this situation of dealing with the question on the basis of res judicata. In other words, once there is a litigation—a litigation started by the Commission, a litigation started by the Attorney General, or a litigation started by the individual—*the remedy has been chosen and can be followed through and no relitigation of the same issues in a different forum would be permitted.*"

Legislative History at 1400-01 (Remarks of Sen. Javits) (emphasis added).

Congressional concern over duplicate suits again was expressed during consideration of a provision in the 1972 amendments that would have conferred cease and desist power on EEOC. Although the cease and desist provision was eventually amended out of the bill, Congress' concern over duplication was made clear in the House Report relating to the 1972 Amendments:

> "The committee was concerned about the interrelationship between the newly created cease and desist . . . powers of the Commission and the existing right of private action. *It concluded that duplication of proceeding should be avoided.* The bill, therefore, contains a provision for termination of . . . the right of private action once the Commission issues a complaint or enters into a conciliation or settlement agreement which is satisfactory to the Commission and to the person aggrieved."

H.R. Rep. No. 238, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 2148 (em-

phasis added). See *EEOC v. Missouri Pacific R.R.*, 493 F.2d 71, 74 (8th Cir. 1974).

Accordingly, the intention of Congress to apply res judicata to Title VII and to discourage the duplication of proceedings was manifested in both debate and committee report. This Court has on numerous occasions declared that "the intention of the lawmaker is the law."[9] When a legislature "has intimated its will," Justice Holmes declared, "that will should be recognized and obeyed. . . ." *Johnson v. United States*, 163 F. 30, 32 (1st Cir. 1908), *quoted in Keifer & Keifer v. R.F.C.*, 306 U.S. 381, 391 n.4 (1939).

C. Notwithstanding Title VII's Multiple Enforcement Scheme, This Court Has Preserved the Integrity of Traditional Preclusion Rules For Application in This Kind of Case

The merits of the doctrine of res judicata and the beneficial consequences flowing from its uniform application have been noted by this Court on many occasions. In one recent case, this Court affirmed that the doctrine "serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case." *Federated Department Stores, Inc., et al. v. Moitie*, 101 S. Ct. 2424, 2429 (1981). "There is simply 'no principle of law or equity,'" this Court reiterated, " 'which sanctions the rejection by a federal court of the salutary principle of *res judicata.*' " *Id., citing Heiser v. Woodruff*, 327 U.S. 726, 733 (1946).

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[9] *Hawaii v. Mankichi*, 190 U.S. 197, 212 (1903); *United States v. Freeman*, 44 U.S. (3 How.) 556, 565 (1845); *United States v. Babbitt*, 66 U.S. 55, 61 (1861).

Notwithstanding this flat presumption favoring judicial preclusion, however, the petitioner seeks to carve out an exception for Title VII cases on the basis of several of this Court's decisions which address the statute's multiple enforcement scheme. Not only is this approach wholly lacking in support, but a careful reading of those cases reflects this Court's concern that the traditional principles of judicial preclusion *not* be disturbed in the Title VII area.

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), for example, this Court concluded that an individual does not forfeit his private cause of action under Title VII if he initially pursues his grievance to final arbitration under the nondiscrimination clause of a collective bargaining agreement. The Court perceived fundamental differences between the arbitral and judicial forums and concluded that the policies of each forum were promoted by independent consideration of the claim. 415 U.S. at 50-51.[19] In emphasizing that the arbitrator, unlike the courts, was without authority to invoke public law concepts, including those of Title VII, *id.* at 51, the Court narrowed its holding in a way that fully pro-

[19] The Court observed that by submitting a grievance to arbitration, an employee is pursuing a contract right that flows from the collective bargaining agreement. The rights asserted in a Title VII action, on the other hand, flowed from an act of Congress independent of the labor-management bargaining process and are not subject to labor arbitration. 415 U.S. at 52. A state employment discrimination claim, of course, flows from an act of a legislature and where, as in this case, a fair hearing is held, the state procedure affords a complainant the opportunity to vindicate a public right similar to Title VII. This is evidenced by express deferral provisions in Title VII requiring initial resort to state EEO enforcement mechanisms.

tected the continued applicability of judicial preclusion.

Of similar import is *Chandler v. Roudebush*, 425 U.S. 840 (1976). There the plaintiff, a federal employee, litigated an employment discrimination claim before the Civil Service Commission and, after an adverse ruling, sought de novo review by the federal district court. This Court upheld the plaintiff's right to such a review, because the legislative history of Title VII evinced "an unambiguous choice to grant federal employees the right to plenary trials in the federal district courts." *Id.* at 853-854. The Court, however, plainly avoided any compromise of preclusion principles. Rather, it based its decision upon the explicit Congressional concern that primary adjudicative authority in the area of discrimination in federal employment repose in Federal district courts, and *not* in federal agencies. *Id.* at 853. Accordingly, construing *Chandler* in its broadest light, the decision merely suggests support for the proposition that a state *administrative* ruling will not bind federal courts in later Title VII actions.

On the other hand, the implication that res judicata remains appropriate under Title VII [11] and should

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[11] "Principles of res judicata," it has been observed, "are fully applicable to actions brought under the federal Civil Rights Act." *Bennun v. Bd. of Governors of Rutgers*, 413 F. Supp. 1274, 1279 (D. N.J. 1976), *citing Preiser v. Rodriguez*, 411 U.S. 475, 497 (1973) (§ 1983). *See also Allen v. McCurry*, 101 S. Ct. 411 (1980) (collateral estoppel applicable under § 1983). Encouraged, in part, by this Court's reaffirmation in *Stone v. Powell*, 428 U.S. 465, 485 n.35 (1976), that state courts provide forums as fair and as competent as federal courts for adjudication of Fourth Amendment claims, the

apply in the case of proceedings brought under New York's anti-discrimination laws is strengthened by this Court's opinion in *New York Gaslight Club v. Carey*, 447 U.S. 54 (1980). This Court there addressed whether a prevailing plaintiff in an action brought under Title VII in federal court would collect attorney's fees incurred in prior state proceedings on the discriminatory employment complaint. The Court ruled that because Section 706(k) authorizes a fee award to the prevailing party in "any . . . proceeding under this title," the statute implicitly allows for federal judicial proceedings in the area of attorney's fees to *supplement* state deferral proceedings. In so ruling, this Court indicated that because Title VII anticipates a successive state agency-federal court enforcement scheme, partial relief obtained locally could be made complete in subsequent proceedings. The Court's ruling, however, did not in any way indicate that New York state judicial proceedings were not preclusive to the extent relief was granted. Indeed, the Court specifically noted attributes of the State's procedural scheme that plainly call for the application of preclusion principles. Thus, the "New York state procedure," this Court observed, "provides for adversarial quasi-judicial hearings leading to findings of fact, administrative appeals, and judicial review." 447 U.S. at 68. The procedures there outlined are the same as those involved in this case. Here, however, petitioner voluntarily triggered state judicial review of

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Second Circuit previously has ruled that adjudication under New York's fair employment law bars later adjudication under Section 1981. *Mitchell v. National Broadcasting Co.*, 553 F.2d 265 (2d Cir. 1977).

the state administrative proceedings. This Court in *Carey* did not approve redundant litigation, but spoke only in terms of "complementary" remedies, 447 U.S. at 65.

Even with respect to Title VII enforcement itself, which contains provisions for multiple remedies, this Court has cautioned against duplicate litigation. In *General Telephone Co. of the Northwest, Inc., v. EEOC*, 446 U.S. 318 (1980), this Court ruled that the EEOC may maintain its § 706 civil actions for the enforcement of Title VII and may seek specific relief for a group of aggrieved individuals without first obtaining class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure. Although the holding did not make the judgment in an EEOC suit binding upon all individuals with similar grievances in the class or subclasses that might be certified, this Court specifically cautioned against the possibility of double suits:

> "The courts, however, are not powerless to prevent undue hardship to the defendant and should perform accordingly. . . . Where the EEOC has prevailed in its action, the court may reasonably require any individual who claims under its judgment to relinquish his right to bring a separate private action. The Title VII remedy is an equitable one; a court of equity should adjust the relief accordingly."

446 U.S. at 333. *See also Jefferson v. Connors Steel Co.*, 25 EDP ¶ 31,602 at 19,485 (N.D. Ala. 1981) (*General Telephone* does not alter bar as to duplicate lawsuits).

Petitioner seeks to evade the application of these principles by arguing that his state proceedings were perfunctory and that, in any event, res judicata

application could have unfair consequences if complainants lost the right to trial de novo in federal court under Title VII because defendants triggered state judicial review of administrative proceedings. Neither contention has merit.

With respect to the nature of the state proceedings, it should be noted that they were the same as this Court described in its opinion in *New York Gaslight Club, Inc. v. Carey, supra.* There is no evidence that the state proceedings failed to accord petitioner the traditional indices of due process. As the Second Circuit correctly noted previously, the "right to a day in court" does not mean "the actual presentation of the case in the context of a formal, evidentiary hearing," but rather "the right to be duly cited to appear and to be afforded an opportunity to be heard," *Mitchell v. National Broadcasting Co.*, 553 F.2d 265, 271 (2d Cir. 1977), *citing Olsen v. Muskegon Piston Ring Co.*, 117 F.2d 163, 165 (6th Cir. 1941), *quoted in* 1B *Moore's Federal Practice* ¶ 0.409-1, at 1008 (1974). The court below here observed that petitioner was accorded an investigation which included three interviews and an examination of documents, and that he argued his case both orally and in writing to a state appeals board. J.A. 69-70. In accordance with New York procedures, the Appellate Division of the State Supreme Court reviewed the record. J.A. 25-26. On these facts, it cannot be said that petitioner was denied a fair opportunity to present his employment discrimination claims.[12]

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[12] In examining the plaintiff's complaints about the fairness of the proceeding below it should be recalled that the plaintiff was not compelled to pursue his claim through the

Petitioner's argument that *defendant-triggered* state judicial review will frustrate Title VII's provision affording federal trial *de novo* can quickly be disposed of by observing, quite simply, that the issue is not before this Court. For the record, however, it should be noted that the federal courts are capable of exercising discretion to avoid any potential for unfairness in the application of prior adjudication doctrines. Thus, for example, where Title VII plaintiffs have instituted employment discrimination suits in federal and state courts in tandem, federal courts have granted stays of the federal litigation pending the outcome of state court proceedings. See *Carr v. Grace*, 516 F.2d 502 (5th Cir. 1975); *Kent v. New York City, Dept. of Sanitation*, 24 EDP ¶ 31,343 (S.D.N.Y. 1980).

In this case, the operative legal principles are clear. Exhaustion of state proceedings is *not* required by the deferral provision of Title VII. The petitioner

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state appellate process. Thus, his complaints of unfairness are even less compelling than those of the plaintiff in *Allen v. McCurry* where this Court noted that the plaintiff did not want to be in the state forum. As the Court stated:

> There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding *in which he would rather not have been engaged at all.*

101 S. Ct. at 420 (emphasis added). Moreover, despite the fact that the plaintiff is dissatisfied with the state judgment and believes it is incorrect, this Court has indicated that even an *erroneous* judgment of another court does not weigh in favor of circumventing the preclusive effect of a prior court ruling. See *Federated Dept. Stores, Inc., et al. v. Moitie*, 101 S. Ct. at 2427-28.

never was forced into the "Catch-22 choice" of complying with exhaustion requirements and losing his federal claim or bringing a federal claim and suffering a dismissal for failure to exhaust. See *James v. Board of Education*, 461 F.2d 566, 571 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972). Here, res judicata attached when the petitioner chose to pursue his claim in the state courts, and not before. See *Mitchell v. National Broadcasting Co.*, 553 F.2d at 276; *Sinicropi v. Nassau County*, 601 F.2d 60 (2d Cir.), *cert. denied*, 444 U.S. 983 (1979).

D. Significant Policy Considerations Arising From The Multiplicity of Forums and Remedies Available In EEO Disputes Favor The Application of Judicial Preclusion

As a result of multiple federal statutes and rules, and an expanding array of state laws, a defendant accused of employment discrimination is subject to overlapping remedial schemes [13] and enforcement au-

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[13] Although employment discrimination remedies are independent, *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48 (1974), the presumption against redundant litigation remains. As one commentator has observed and opined:

> "Although providing multiple remedies, neither Congress nor the Court, however, has approved multiple suits as a means to effectuate those remedies. When multiple discrimination claims arise from a single event, the grievant can prosecute the multiple claims in a single suit. To permit multiple suits based on independent remedies would only harass defendants without appreciably serving the desire to end discrimination."

Note, *Res Judicata in Successive Employment Discrimination Suits*, 1980 U. Ill. L.F. 1049, 1095.

thorities. Consequently, the potential for vexatious litigation, inconsistent judgments, and judicial inefficiency is enormous. The consistent and even-handed application of judicial preclusion doctrines represents the most equitable and effective means by which to curb complainants from engaging in redundant litigation.

In view of Congress' intent "to allow an individual to pursue independently his rights under both Title VII and other . . . federal statutes," *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975), it is particularly compelling that doctrines limiting multiple actions be available "to mitigate the harshness to those accused of employment discrimination resulting from what one source has described as 'multiple jeopardy' . . . ." (citation omitted) *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641, 658 (5th Cir. 1974).

In the area of employment discrimination, no less so than in the area of antitrust, arguments against prior adjudication on the grounds of "simple justice" are misplaced. See *Federated Dept. Stores, Inc., et al. v. Moitie*, 101 S. Ct. 2424 (1981). In view of the multiple remedies available in employment discrimination, this Court's observation in *Moitie* is particularly compelling:

> "The predicament in which [petitioner] finds himself is of his own making . . . we cannot be expected, for his sole relief, to upset the general and well-established doctrine of res judicata, conceived in the light of the maxim that the interest of the state requires that there be an end to litigation—a maxim which comports with common sense as well as public policy. And the

> mischief which would follow the establishment of precedent for so disregarding the salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship."

Moitie, 101 S. Ct. at 2429, *citing Reed v. Allen*, 286 U.S. 191, 198-99 (1932).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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No. 80-6045

In the Supreme Court of the United States

OCTOBER TERM, 1980

RUBIN KREINER, PETITIONER

v.

CHEMICAL CONSTRUCTION CORP.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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QUESTION PRESENTED

Whether a state agency's dismissal, upheld by a reviewing state appellate court under a sharply limited form of review, of an employment discrimination claim arising under the state law, has any preclusive effect in federal court adjudication of a Title VII employment discrimination claim based upon the same incident.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's invitation to the Solicitor General, at the petition stage, to file a brief expressing the views of the United States.

STATEMENT

Petitioner, a Jew who immigrated to this country from Poland in 1970, was employed in New York as an engineer by respondent, an international engineering and construction firm (Pet. 2; Br. in Opp. 2). He claims that he was discharged and was not rehired by respondent because of his religion and national origin (J.A. 55).

Acting pro se,[1] petitioner filed a charge of discrimination with the Equal Employment Opportunity Commis-

[1] Petitioner apparently acted pro se throughout the state and federal proceedings until he reached the court of appeals for the Second Circuit.

sion ("EEOC"), asserting that respondent had discriminated against him in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a). As required by Title VII and its regulations,[2] the EEOC referred the charge to the appropriate state administrative agency, the New York State Division of Human Rights ("NYSHRD"), to consider whether respondent's actions violated the State's Human Rights Law, N.Y. Exec. Law § 296 (McKinney 1972 & Supp. 1972-1980) (J.A. 44, 55, 69).

Proceedings on the State Claim

The NYSHRD determined, after an investigation, that there was no probable cause to believe that respondent had violated the New York statute, embodying this conclusion in a cursory order (J.A. 13).[3] Petitioner pursued an administrative appeal to the State Human Rights Appeal Board, which concluded, on review of the record, that the NYSHRD's determination was "not arbitrary, capricious or an abuse of discretion" (J.A. 15). Attached to the order of the Appeal Board was a notice stating that petitioner could obtain judicial review by filing a petition in the appropriate Appellate Division of the New York Supreme Court (J.A. 17). Petitioner sought to have the Appellate Division of the New York Supreme Court set aside the order of the Appeal Board pursuant to N.Y. Exec. Law § 298 (McKinney Supp. 1972-1980) and N.Y. Civ. Prac. Law art. 78 (McKinney 1981). After a review of the administrative record, the Appellate Division "confirmed" the order of the Appeal Board without opinion (J.A. 25-26).

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[2] 42 U.S.C. 2000e-5(c); 29 C.F.R. 1601.12(a) and (b)(1) (1976); 29 C.F.R. 1601.13(c) and (d) (1980); 29 C.F.R. 1601.13(a)(4)(i) and (a)(5), at 45 Fed. Reg. 81040 (1980) (interim rule). See *Love* v. *Pullman Co.*, 404 U.S. 522 (1972).

[3] The NYSHRD apparently conducted no hearing, did not otherwise take testimony (Br. in Opp. 4-5), and entered only skeletal and incomplete findings in support of its decision to terminate proceedings on petitioner's claim at the threshold (see J.A. 13).

Proceedings on the Federal Claim

As required by statute and regulation,[4] the EEOC accorded "substantial weight" to the findings of the NYSHRD when they became final upon confirmation by the Appellate Division.[5] Based on the NYSHRD's findings and the record, the District Director of the EEOC determined that there was no reasonable cause to believe that Title VII had been violated (J.A. 27). The District Director issued petitioner a right-to-sue letter, informing petitioner that he was entitled to bring his Title VII claim in federal court (J.A. 29-33).

Petitioner then filed this action in the United States District Court for the Southern District of New York, asserting a claim under Title VII (J.A. 36-38). Respondent moved to dismiss the complaint under Fed. R. Civ. P. 12(b) or, alternatively, for summary judgment under Fed. R. Civ. P. 56 on the ground of res judicata. The district court denied the motion (J.A. 43-52). Thereafter, in an unrelated case, *Sinicropi* v. *Nassau County*, 601 F.2d 60, 62, cert. denied, 444 U.S. 983 (1979), the United States Court of Appeals for the Second Circuit held that the doctrine of res judicata bars adjudication of a Title VII claim in federal court following adjudication of a state discrimination claim by a state administrative agency and review of the administrative record by a state appellate court.[6] Following the

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[4] 42 U.S.C. 2000e-5(b); 29 C.F.R. 1601.21(e) (1978 & 1980).

[5] Petitioner had, on at least one occasion, sought to renew EEOC proceedings prior to the decision of the Appellate Division (J.A. 18-22).

[6] The court of appeals' brief per curiam opinion in *Sinicropi* relied solely upon *Mitchell* v. *National Broadcasting Co.*, 553 F.2d 265 (2d Cir. 1977), an employment discrimination case arising under 42 U.S.C. 1981. In *Mitchell*, the court of appeals reasoned that the issue raised by the Section 1981 claim was identical to that presented to the NYSHRD (553 F.2d at 269-270), and that the state agency proceeding afforded an "adjudicatory process com-

decision in *Sinicropi*, respondent renewed its motion to dismiss petitioner's complaint. This time the district court reluctantly granted respondent's motion, observing that "*Sinicropi* permits no choice but to dismiss plaintiff's complaint * * * on grounds of res judicata" (J.A. 59), but set forth at length (*id.* at 60-67) its view that *Sinicropi* was inconsistent with the policy of Title VII and this Court's decisions thereunder and had been wrongly decided.

The court of appeals affirmed, without discussing the merits of the *Sinicropi* rule, deeming itself unauthorized to reconsider *Sinicropi* without sitting en banc (J.A. 71-73) and holding that *Sinicropi* was to be applied retroactively to the instant case.[7] A petition for rehearing, with a suggestion for en banc consideration, was denied with two judges dissenting (J.A. 79-80).

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parable" to federal court adjudication. The court concluded that the NYSHRD's probable cause determination was analogous to the summary judgment procedure in federal courts, based upon the belief that the NYSHRD was required to resolve all factual questions in favor of the complainant at this juncture (*id.* at 270-271). The court concluded further that, under 28 U.S.C. 1738, the affirmance of the NYSHRD's decision adverse to the claimant by the New York Appellate Division created a res judicata bar to the federal court action, notwithstanding the limited scope of judicial review exercised. 553 F.2d at 271-277. The *Mitchell* panel disclaimed any view on whether preclusion would be required in a Title VII case (*id.* at 275 n.13) in response to Judge Feinberg's dissent (*id.* at 277-280) stressing the inconsistency he perceived between the result and the policy of Title VII. The *Sinicropi* panel, however, could "see no reason to distinguish between section 1981 and Title VII for res judicata purposes." 601 F.2d at 62. Judge Feinberg, a member of the *Sinicropi* panel as well, joined the panel's opinion, noting that he would reach the opposite result "if the slate were clean." *Ibid.*

[7] This Court excluded from the grant of certiorari the question whether retroactive application of *Sinicropi* was proper. Certiorari had been denied in *Sinicropi* itself prior to the emergence of a clear conflict among the circuits as to the preclusive effect of a state court affirmance of an adverse state agency ruling in a subsequent Title VII action in federal court.

SUMMARY OF ARGUMENT

In enacting Title VII of the Civil Rights Act of 1964, Congress deliberately secured the right of adjudication in federal court to individuals claiming to be aggrieved by unlawful employment discrimination. This Court has repeatedly concluded that this right is neither forfeited nor diminished by an aggrieved individual's resort to alternative remedies and forums empowered under state or federal law, or under private agreements, to redress employment discrimination. The decision of the court of appeals accordingly creates a unique exception to the protection afforded by Title VII.

In Title VII Congress defined the relationship between state proceedings and Title VII proceedings, by providing that the findings of state fair employment authorities must be given substantial—but no greater—weight by the EEOC. 42 U.S.C. 2000e-5(b). And this Court has held that Congress declined to bind the federal district courts with the conclusions reached by the EEOC under this standard, affirming, instead, that adjudication in federal court is to be de novo. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 799 (1973). Accordingly, the court of appeals erred in giving preclusive effect to the decision of state authorities, applying state law, in this case.

The fact that petitioner sought judicial review of the state agency decision in state court should not alter the outcome here. The special proceeding initiated by petitioner was an integral part of the state remedial procedure. Moreover, although petitioner's resort to state court review was not required by Title VII, it was fully consistent with the policy of Title VII, favoring full use of available state remedies. No principled distinction can be drawn between the circumstances of this case, and cases in which an employer initiates judicial review of a state agency decision.

Neither 28 U.S.C. 1738 nor any judge-made preclusion doctrine justifies the result reached by the court of ap-

peals. Two of the well-established exceptions to the preclusion doctrines are applicable here. First, the exceedingly limited state proceedings, in which conflicting factual contentions were resolved adversely to petitioner although no hearing had been held, do not constitute a full or fair adjudication of petitioner's rights. Second, the unique policy adopted by Congress in Title VII, providing for parallel and overlapping remedies, bars application of preclusion doctrines. The interests of federal-state comity would not be advanced by the rule adopted by the court of appeals. Under that rule any well-advised claimant would limit resort to state proceedings to the bare minimum required by law. Individuals who are not so advised will, in ignorance, forfeit their rights under federal law. Thus, unless Congress should decide to alter the carefully crafted enforcement scheme of Title VII, petitioner is entitled to full adjudication of his Title VII claim in federal court.

ARGUMENT

PETITIONER IS ENTITLED TO DE NOVO FEDERAL COURT ADJUDICATION OF HIS CLAIM OF EMPLOYMENT DISCRIMINATION UNDER TITLE VII

A. Title VII Allows an Aggrieved Individual to Pursue Rights Under Other State and Federal Laws Without Sacrificing His Right to Adjudication of His Title VII Claim in Federal Court

1. In enacting Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. III) 2000e *et seq.*, Congress not only created a statutory right to be free of invidious discrimination in employment, but also created a comprehensive scheme for the vindication of that right. *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 63 (1980); *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 457-459 (1975). "[D]esigned to supplement, rather than supplant, existing laws and institutions relating to employment discrimination," *Alexander* v. *Gardner-Denver Co.*,

415 U.S. 36, 48-49 (1974), Title VII "provides for consideration of employment-discrimination claims in several forums": state and federal, administrative and judicial. *Id.* at 47.

Under the scheme created by Congress, whenever an incident of alleged employment discrimination occurs in a state or locality which by law prohibits such discrimination and which has established an "authority to grant or seek relief from such [discrimination] or to institute criminal proceedings with respect thereto," no charge of discrimination may be actively processed by the EEOC until the local remedy has been invoked and at least 60 days have passed thereafter, or the local proceedings have terminated, whichever comes sooner. 42 U.S.C. 2000e-5(c).[8] After providing the appropriate state agency an opportunity to resolve the complaint, an aggrieved individual may press his complaint before the EEOC (see note 8, *supra*). The Commission conducts an investigation to determine whether there is reasonable cause to believe that the charge of employment discrimination is true. 42 U.S.C. 2000e-5(b). In this investigation the Commission is required to "accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law" pursuant to the deferral requirement of 42 U.S.C. 2000e-5(c) and 2000e-5(b), but is not bound by such findings. *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 48 n.8. If the EEOC finds reasonable cause to believe that unlawful discrimination has occurred, it undertakes conciliation efforts to eliminate the unlawful practice. 42 U.S.C. 2000e-5(b). If these efforts fail, the Commission may elect to bring a civil action to enforce the Act. If the Commission declines to do so, or if the Commission finds no reasonable

[8] The EEOC may accept employment discrimination charges prior to this time, referring them to the appropriate state authority, if any, on behalf of the complainant, and deferring further action to allow the state authority an opportunity to resolve the dispute. *Love* v. *Pullman Co.*, 404 U.S. 522 (1972).

cause to believe that a violation has occurred, it must issue a "right to sue" letter alerting the aggrieved party to his right to commence a civil action to obtain an adjudication of his rights. 42 U.S.C. 2000e-5(f)(1). Thus, it is only after state authorities, acting under any pertinent state law, and the EEOC have had an opportunity to investigate and act upon a claim of employment discrimination that a civil action under Title VII may be commenced in district court.

2. In a series of decisions this Court has considered the relationship between various kinds of proceedings, which may provide redress for employment discrimination, and the civil action in federal court which is the ultimate remedy established by Title VII. The Court has invariably concluded that "submission of a claim to one forum does not preclude a later submission to another." *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 47-48 & n.8. Under the rationale of these decisions, we submit, the holding of the court of appeals in the instant case is irreconcilable with the fundamental purpose and design of Title VII.

In *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798-799 (1973), the Court specified that neither the EEOC's failure to find reasonable cause supporting a complaint nor an EEOC finding of no reasonable cause bars a civil action in federal court. In reaching this conclusion, the Court stressed that EEOC procedures do not match those in adversarial judicial proceedings, and that Congress intended civil actions under Title VII to be de novo proceedings. *Ibid.* Similarly, the Court has concluded that the right to de novo adjudication of a Title VII claim is not foreclosed by submission of a claim on the complainant's behalf to final arbitration under the anti-discrimination provision of a collective bargaining agreement, noting that Congress intended to allow "parallel or overlapping remedies against discrimination * * *." *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 47. And the Court there specifically rejected

the application of any doctrine of preclusion as a bar to de novo adjudication in federal court, stating (*id.* at 49 n.10):

> The policy reasons for rejecting the doctrines of election of remedies and waiver in the context of Title VII are equally applicable to the doctrines of *res judicata* and collateral estoppel.

Moreover, notwithstanding the fact that the right established by the collective bargaining agreement in issue was "facially similar" to that secured by Title VII, the Court concluded the disparity between the informal procedures available in arbitration and those available in federal court under Title VII made any form of deference to the arbitrator's decision unwarranted. *Id.* at 56-59.

These principles have been applied in a variety of settings. The Court underscored that Title VII provides a remedy independent of other avenues for redressing employment discrimination, notwithstanding any duplication created by this arrangement, in holding that the filing of a timely complaint with the EEOC under Title VII does not toll the statute of limitations on a racial discrimination in employment claim filed under 42 U.S.C. 1981. *Johnson* v. *Railway Express Agency*, *supra*, 421 U.S. at 459-461. In *Chandler* v. *Roudebush*, 425 U.S. 840 (1976), the Court concluded that aggrieved federal employees have a right to trial de novo in federal court upon their claims of employment discrimination under Title VII, notwithstanding any prior administrative proceeding, rejecting the contention that judicial review of the administrative record could satisfy the mandate of Title VII.[9]

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[9] Similarly, it has been held that the right to a trial de novo on Title VII claims is not foreclosed by a prior judgment under the Railway Labor Act, *Norman* v. *Missouri Pacific R.R.*, 414 F.2d 73, 75 n.2, 84 (8th Cir. 1969), cited with approval in *Chandler* v. *Roudebush*, *supra*, 425 U.S. at 845, or under the National Labor

Finally, only last Term, this Court reiterated that "the 'ultimate authority' to secure compliance with Title VII resides in the federal courts." *New York Gaslight Club, Inc.* v. *Carey, supra*, 447 U.S. at 64. The New York procedure employed by petitioner in the instant case was also employed by the complainant in *Carey*. Carey had filed a charge with the EEOC, which was referred to the New York State Division of Human Rights. The NYSHRD found for Carey, however, and ordered back pay and injunctive relief. The New York Gaslight Club appealed to the state's Human Rights Appeal Board, which confirmed the Division's decision; the Club then brought a special proceeding for review of the Division's decision in the Appellate Division of the New York Supreme Court, which in turn "confirmed" the Division's decision. *State Division of Human Rights ex rel. Speller* v. *New York State Drug Abuse Control Commission*, 59 A.D. 2d 852, 399 N.Y.S.2d 158 (1977). By the time Carey's Title VII claim was considered by the district court, she had been awarded all of the relief she had claimed, through the state proceedings, except for attorney's fees. The Court held that Title VII authorizes a federal court to award attorney's fees for legal representation in the state administrative and judicial proceedings, observing that (447 U.S. at 67-68; emphasis added):

> Title VII explicitly leaves the States free, and indeed encourages them, to exercise their regulatory power over discriminatory employment practices. *Title VII merely provides a supplemental right to sue in federal court if satisfactory relief is not obtained in state forums.* § 706(f)(1) [42 U.S.C. 2000e-5(f)(1)]. One aspect of complete relief is an award of attorney's fees, which Congress considered

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Relations Act, 29 U.S.C. 151 *et seq.*, *Taylor* v. *Armco Steel Corp.*, 429 F.2d 498, 499 (5th Cir. 1970). Likewise, decisions of administrative agencies under other statutes do not preclude de novo judicial consideration of Title VII claims. *E.g.*, *Tipler* v. *E.I. duPont deNemours & Co.*, 443 F.2d 125, 128-130 (6th Cir. 1971) (decision by the NLRB); *Garner* v. *Giarrusso*, 571 F.2d 1330, 1336-1338 (5th Cir. 1978) (decision by a local Civil Service Commission).

necessary for the fulfillment of federal goals. Provision of a federal award of attorney's fees is not different from any other aspect of the ultimate authority of federal courts to enforce Title VII. For example, if state proceedings result in an injunction in favor of the complainant, but no award for backpay because state law does not authorize it, the complainant may proceed in federal court to "supplement" the state remedy.

3. In the foregoing cases the Court has examined the relationship between a civil action under Title VII and almost all of the conceivable forms of proceedings to redress employment discrimination, including both those specifically contemplated by Title VII and those which are entirely independent of Title VII. In each instance, the Court has concluded that the ultimate right to trial of employment discrimination claims in federal court afforded by Title VII is unimpaired by resort to any prior proceeding or alternate remedy. The decision below thus creates a unique gap in the remedy conferred by Title VII, in contravention of the carefully crafted enforcement scheme and the congressional policy embodied therein.

By providing in 42 U.S.C. 2000e-5(b) that the EEOC must give substantial weight—but not preclusive effect (see *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 48 n.8)—to final findings by a state authority to which a discrimination complaint has been submitted, Congress necessarily indicated that a final determination in state employment discrimination proceedings, even if upheld upon judicial review, cannot bar the right to full adjudication in federal court of an aggrieved individual's Title VII claim. For, as the courts of appeals have generally recognized, it would be anomalous to hold that federal courts, endowed with "ultimate authority" to enforce Title VII, *id.* at 45, through de novo review of all claims, must bow to state determinations, while the EEOC need not do so. See *Smouse* v. *General Electric Co.*, 626 F.2d 333, 335 (3d Cir. 1980); *Gunther* v. *Iowa State*

Men's Reformatory, 612 F.2d 1079, 1084 n.6 (8th Cir.), cert. denied, 446 U.S. 966 (1980); see also *Garner* v. *Giarrusso*, 571 F.2d 1330, 1337 (5th Cir. 1978); *Batiste* v. *Furnco Construction Corp.*, 503 F.2d 447, 450 & n.1 (7th Cir. 1974), cert. denied, 420 U.S. 928 (1975); *Cooper* v. *Philip Morris, Inc.*, 464 F.2d 9, 12 (6th Cir. 1972). Such a requirement for deference by the federal courts would also render Section 706(f) of the Act, 42 U.S.C. 2000e-5(f), providing for investigation and conciliation efforts by the EEOC, meaningless in such cases—for the EEOC has no enforcement powers and would be unable to resolve a complaint rejected by state authorities through conciliation if the respondent knew that no remedy was available in federal court. See *Batiste* v. *Furnco Construction Corp.*, *supra*, 503 F.2d at 450 n.1.

4. The court of appeals deemed the considerations outlined above inapplicable here, as in *Sinicropi*, *supra*, 601 F.2d at 62, on the ground that the petitioner here sought judicial review of the decision of the NYSHRD. This distinction was predicated upon the court's view that Title VII, 42 U.S.C. 2000e-5(c), requires only deferral to state administrative proceedings.[10] But the fact that Title VII does not necessarily require resort to state judicial proceedings[11] is immaterial for, although Congress mandated only a 60-day deferral to state proceedings, it intended "to encourage *full use* of state remedies." *New York Gaslight Club, Inc.* v. *Carey*, *supra*, 447 U.S.

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[10] The court stated in *Mitchell* v. *National Broadcasting Co.*, *supra* (see note 6, *supra*), 553 F.2d at 275-276, that "[t]he deferral requirements of Title VII do not contemplate resort to state judicial review." But see pages 13-14 and note 13, *infra*.

[11] While the New York State fair employment procedures would permit a complainant to satisfy deferral requirements without resort to a judicial forum, this is not always the case. See, *e.g.*, *White* v. *Dallas Independent School District*, 581 F.2d 556, 559, 561 (5th Cir. 1978) (en banc), holding that Title VII requires deferral to local prosecutors authorized under Texas law to institute criminal proceedings.

at 66 n.6 (emphasis added). Thus, the fact that a complainant may be able to satisfy Title VII's deferral requirement without going into state court does not mean that Congress' intent that Title VII "supplement, rather than supplant, existing laws and institutions relating to employment discrimination," *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 48-49, would be served by a rule requiring a complainant to forgo all review of the dismissal of his state claim lest he foreclose opportunity to secure trial of his Title VII claim in federal court. Compare *Allen* v. *McCurry*, No. 79-935 (Dec. 9, 1980), slip op. 14 n.23. Indeed, Title VII itself makes no distinction between state administrative and state judicial proceedings—either in its provisions requiring deferral to "a State or local authority [authorized] to grant or seek relief from such practice or to institute criminal proceedings with respect thereto" (42 U.S.C 2000e-5(c) and (d)), or in its provision that "the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section" (42 U.S.C. 2000e-5(b)). And, as previously noted (pages 7 and 11, *supra*), the latter provision requires the Commission to afford substantial weight—but not preclusive effect—to the state tribunal's findings.

Moreover, the limited judicial review petitioner secured in state court in this case is an integral part of the remedial scheme established by New York to address claims of employment discrimination. Thus, in *New York Gaslight Club, Inc.* v. *Carey*, *supra*, 447 U.S. at 68 (emphasis added), the Court explained that "[t]he New York state procedure, to which respondent's charge was referred, provides for adversary quasi-judicial hearings leading to findings of fact,[12] administrative appeals, and *judicial*

[12] No such hearing was afforded to petitioner, however. See page 2 note 3, *supra*, and page 15, *infra*.

review." [13] Stressing "the statute's structure of cooperation between federal and state enforcement authorities," the Court refused to distinguish, for the purpose of fee awards, between administrative and judicial proceedings or between state and federal proceedings (*id.* at 61-62), remarking, without qualification, that "Congress viewed proceedings before the EEOC and in federal court as supplements to available state remedies for employment discrimination." *Id.* at 65.

Indeed, if the petitioner had prevailed in the state administrative proceedings, as did the complainant in *Carey*, petitioner would have had compelling reason to defend that result had the employer sought state court review, again as in *Carey*, lest the administrative findings be set aside upon his default. To give preclusive effect in federal court to the state court judgment in such circumstances would, obviously, eviscerate Title VII. Although the Court of Appeals for the Second Circuit has reserved judgment on whether the outcome of state judicial review initiated by the adverse party should be given preclusive effect in subsequent Title VII proceedings in federal court, *Mitchell* v. *National Broadcasting Co.*, *supra*, 553 F.2d at 275 n.13, other courts which have considered the question regard such a distinction as untenable, see *Unger* v. *Consolidated Foods Corp.*, Nos. 80-2792 & 80-2844 (7th Cir. Aug. 14, 1981), slip op. 7; *Smouse* v. *General Electric Co.*, *supra*, 626 F.2d at 336; *Gunther* v. *Iowa Men's Reformatory*, *supra*, 612 F.2d at 1084 n.6, and it is without support in the structure or language of Title VII. Cf. *New York Gaslight Club, Inc.* v. *Carey*, *supra*, 447 U.S. at 61-62. Moreover, it is doubtful that the preclusion doctrines or 28 U.S.C. 1738 would permit

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[13] The Court characterized the question presented in *New York Gaslight Club, Inc.*, *supra*, 447 U.S. at 56 (second emphasis added),

> whether, under Title VII of the Civil Rights Act of 1964, a federal court may allow the prevailing party attorney's fees for legal services performed in prosecuting an employment discrimination claim in *State* administrative *and judicial* proceedings that Title VII requires federal claimants to invoke.

such a distinction. See *Allen* v. *McCurry*, *supra*, slip op. 14.

5. The court of appeals' decision has the impermissible effect of depriving petitioner of his right to adjudicate his Title VII claim in federal court by assigning "primary adjudicative responsibility" to an administrative agency subject only to limited judicial review—the very result rejected in *Chandler* v. *Roudebush*, *supra*, 425 U.S. at 853, 863, and in *McDonnell Douglas Corp.* v. *Green*, *supra*, 411 U.S. at 798-799. As the district court noted (J.A. 60-61), petitioner has never had an adjudication of his claim in any way comparable to the trial of Title VII claims afforded by the federal district courts. The NYSHRD conducted no hearing and took no testimony. Under New York law neither was required prior to entry of a determination of whether there was probable cause to believe that a violation had occurred. N.Y. Exec. Law § 297(2) and 297(4)(a) (McKinney Supp. 1972-1980).[14] The Division of Human Rights was nonetheless empowered to resolve the factual dispute between petitioner and respondent (compare Pet. 2 with Br. in Opp. 2) adversely to petitioner, *State Division of Human Rights ex rel. Speller* v. *New York State Drug Abuse Control Commission*, 59 A.D.2d 332, 335-338, 399 N.Y.S.2d 541, 543-545 (1977),[15] and did so. Nor did the Division of Human

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[14] Even if a hearing had been held, compliance with the rules of evidence would not have been required. N.Y. Exec. Law § 297(4)(a) (McKinney Supp. 1972-1980); compare *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 57.

[15] In *Mitchell* v. *National Broadcasting Co.*, *supra*, 553 F.2d at 270-271, the Second Circuit considered the procedures employed by the NYSHRD adequate, citing *Mayo* v. *Hopeman Lumber & Mfg. Co.*, 33 A.D.2d 310, 313, 307 N.Y.S.2d 691, 695 (1970), for the proposition that "[b]efore the State Division may dismiss a complaint of discrimination for lack of probable cause, "it must appear virtually that as a matter of law the complaint lacks merit,'" and concluding that the "adjudication of no probable cause * * * represents a finding that, assuming the allegations of the complaint to be true, nonetheless as a matter of law the

Rights enter specific finding of fact and conclusions of law (see J.A. 13). Thus, as the district court observed (J.A. 60-61), the court of appeals' analogy (see note 6, *supra*) between the proceedings of the NYSHRD and summary judgment procedures in federal court is fundamentally flawed. Like arbitration, the New York administrative procedure is "an efficient, inexpensive, and expeditious means for dispute resolution," *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 58; these very characteristics make it a "less appropriate forum for final resolution of Title VII issues than the federal courts" (*ibid.*; footnote omitted).

None of the shortcomings of the administrative process was remedied by the administrative appeal taken by petitioner. The Human Rights Appeal Board held no evidentiary hearing and took no evidence. Rather, the Board simply reviewed the record compiled by the Division of Human Rights and, reciting the words of the pertinent statute, upheld the Division's order as not "arbitrary, capricious or an abuse of discretion" (J.A. 15; see N.Y. Exec. Law § 297-a(7)(e) (McKinney 1972). No more searching review is permitted by the governing statute. See N.Y. Exec. Law § 297-a(7) (McKinney 1972).

Finally, contrary to the view expressed by the court of appeals,[16] judicial review of the NYSHRD's decision by the Appellate Division of the Supreme Court does not complete a full adjudication of petitioner's rights. Like the Human Rights Appeal Board, the Appellate Division merely reviews the record. As in any appellate proceeding, conten-

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discharge * * * did not amount to a discriminatory act." However, the Appellate Division's subsequent decision in *Speller*, *supra*, 59 A.D.2d at 335-338, 399 N.Y.S.2d at 543-545, clarified the New York procedure, retreating from the broad sweep of *Mayo*, and making it clear that factual disputes may be resolved adversely to the complainant without holding a hearing.

[16] See *Mitchell* v. *National Broadcasting Co.*, *supra*, 553 F.2d at 272.

tions not pressed below ordinarily may not be raised. The scope of review is strictly limited. N.Y. Exec. Law § 298 (McKinney Supp. 1972-1980); N.Y. Civ. Prac. Law § 7803 (McKinney 1981).[17] The Appellate Division did not enter and could not enter any findings or conclusions or otherwise resolve the conflicting contentions of the parties, nor did the court conclude that material facts were not in dispute. As the Court of Appeals for the Third Circuit observed with respect to Pennsylvania procedures for consideration of employment discrimination claims, analogous in pertinent respect to the New York procedure:

> Because of this narrow scope of review and because many of the procedural limitations of the P[ennsylvania] H[uman] R[elations] C[ommission] are imposed by the legislature and the courts, the procedural difficulties we have noted will not be corrected by appellate review.

Smouse v. *General Electric Co.*, *supra*, 626 F.2d at 336.[18]

The state determination to which the court of appeals gave preclusive effect thus failed to provide petitioner with any of the basic elements of the adjudication afforded by Title VII. No evidentiary hearing has ever been held, and the only findings and conclusions ever entered are the conclusory comments entered by the NYSHRD (J.A. 13). Petitioner has not even had the

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[17] Under Article 78, the only relevant issue that could be raised was whether the NYSHRD's decision was arbitrary, capricious, an abuse of discretion or procedurally defective. N.Y. Civ. Prac. Law § 7803(3) (McKinney 1981). Substantial evidence review was not authorized because no hearing was held, or required to be held, by the NYSHRD. N.Y. Civ. Prac. Law § 7803(4) (McKinney 1981). Under § 298 of the New York Executive Law, "[t]he findings of facts on which * * * [the NYSHRD's] order is based shall be conclusive if supported by sufficient evidence on the record considered as a whole."

[18] The state procedures afforded to the complainant in *Smouse* appear to have been fuller than those afforded to petitioner in the instant case, and included a hearing. 626 F.2d at 334.

full "agency adjudication" subject to "review on a substantial evidence basis" in an appellate court which this Court held insufficient to satisfy the requirements of Title VII in *Chandler* v. *Roudebush*, *supra*, 425 U.S. at 853, 864. Indeed, in *Chandler* the administrative determination was of the Title VII claim itself, under a system providing substantially greater procedural safeguards than petitioner enjoyed here. Yet this Court held the complainant entitled to a trial de novo in federal court, primarily on the ground that Congress intended federal employees to have the same right as other Title VII complainants to an adjudication in federal court. 425 U.S. at 853, 863. To hold petitioner entitled to less would thus be inconsistent with *Chandler* and the congressional intent it reflects (since a federal employee who, like petitioner, sought to invoke his Title VII remedy would not be required to initiate state processes at all; see 42 U.S.C. 2000e-16(d); see also *Brown* v. *General Services Administration*, 425 U.S. 820 (1976)).

The decision of the court of appeals is accordingly inconsistent with the provisions of Title VII, as interpreted by this Court.

B. Neither General Principles of Preclusion Nor 28 U.S.C. 1738 Bars Adjudication of Petitioner's Title VII Claim

The court of appeals reasoned that, inasmuch as the Appellate Division's disposition of petitioner's state law action is treated as final under New York law,[19] the

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[19] A final decision in proceedings under New York's Human Rights Law purportedly precludes "any other action, civil or criminal, based upon the same grievance of the individual concerned." N.Y. Exec. Law § 300 (McKinney 1972). Under the New York law, an aggrieved individual must choose between recourse to the administrative procedure established and ancillary judicial review thereof on the one hand, and a plenary civil action on his state law claims, on the other, N.Y. Exec. Law §§ 297(9) and 300 (McKinney 1972 & Supp. 1972-1980).

state court judgment must likewise be honored by a federal district court hearing a Title VII claim, pursuant to common law preclusion principles and 28 U.S.C. 1738. J.A. 70-73; *Mitchell* v. *National Broadcasting Co.*, *supra*, 553 F.2d at 274-277; *Sinicropi* v. *Nassau County*, *supra*, 601 F.2d at 61-62. This conclusion overlooks well established limitations on the preclusion doctrines and 28 U.S.C. 1738.[20]

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[20] The preclusion doctrines include both res judicata (claim preclusion or "bar" and "merger") and collateral estoppel (issue preclusion). The term res judicata, however, is sometimes used to denote both forms of preclusion. *Allen* v. *McCurry*, *supra*, slip op. 4 & n.5. Although the court of appeals and the district court referred exclusively to "res judicata," application of that doctrine in its more precise sense would be especially inappropriate here. Res judicata traditionally bars litigation of an issue that was or could have been litigated as part of a previously determined cause of action. *Ibid.*; *Montana* v. *United States*, 440 U.S. 147, 153 (1979). Here petitioner's Title VII claim was not before the NYSHRD (see J.A. 9, 13) nor could it have been. The NYSHRD is empowered only to investigate and pass on complaints alleging violations of the New York Human Rights Law, see N.Y. Exec. Law § 295(6) (McKinney 1972), which, as it happens, considerably antedates enactment of Title VII. (Authorities in other states, like the NYSHRD, commonly have jurisdiction only over claims resting on state law. Cf. *Gunther* v. *Iowa State Men's Reformatory*, *supra*, 612 F.2d at 1084 n.5). The Human Rights Appeal Board and the Appellate Division sat only to review the NYSHRD's determination and therefore were equally unauthorized to consider petitioner's Title VII claim. Even if the state agency or the Appellate Division had been vested with jurisdiction to consider petitioner's Title VII claim under state law, as explained in our brief as amicus curiae (at 11-15) in *Minnick* v. *California Department of Corrections*, No. 79-1213 (June 1, 1981), previously provided to the parties in this case, Title VII itself limits jurisdiction to the federal courts. The Court dismissed the writ of certiorari and accordingly did not decide this question in *Minnick*.

If we assume that res judicata in its narrow sense cannot apply in this case, the question remains whether findings entered in a state adjudication have any collateral estoppel effect on a Title VII claim in federal court. For the reasons stated in the text we submit that collateral estoppel may not be applied in the circumstances of this case.

28 U.S.C. 1738 provides, in relevant part:

> The * * * judicial proceedings of any court of any such State * * * shall have the same full faith and credit in every court within the United States * * * as they have by law or usage in the courts of such State * * *.

This provision requires federal courts to give effect to the judgments of state courts. However, the Court has regarded Section 1738 as invoking the common law preclusion doctrines, subject to the full panoply of established exceptions thereto, rather than establishing any "more stringent" doctrine. *Allen* v. *McCurry*, *supra*, slip op. 3 n.2, 5 n.7, 6, 15 & n.25. The Court has recognized that, notwithstanding the preclusion doctrines, "[r]edetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation," *Montana* v. *United States*, *supra*, 440 U.S. at 164 n.11; *Allen* v. *McCurry*, *supra*, slip op. 5, and that special circumstances, including countervailing statutory policies, may also warrant an exception to the normal rules of preclusion. *Montana* v. *United States*, *supra*, 440 U.S. at 155; *Brown* v. *Felsen*, 442 U.S. 127, 139 n.10 (1979); compare *Allen* v. *McCurry*, *supra*, slip op. 7-11. Both of these exceptions to the preclusion doctrines are fully applicable to this case.

As is described above, pages 2 note 3 and 15, petitioner was not allowed a full and fair opportunity to litigate his Title VII claim. The procedures afforded to petitioner simply bear no resemblance to those which Congress deemed appropriate and necessary for the enforcement of Title VII. See *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 57-59; *McDonnell Douglas Corp.* v. *Green*, *supra*, 411 U.S. at 798-799; see also *Chandler* v. *Roudebush*, *supra*, 425 U.S. at 853, 863. This observation reflects no discredit upon the remedy provided by New York, but rests upon the fact that the procedures provided by New York were not designed,

and are not adequate, to provide a final determination of federal rights under Title VII.[21] Compare *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 58. For essentially the same reasons, the Court in *Gardner-Denver Co.* squarely rejected application of "the doctrines of res judicata and collateral estoppel" in the context of Title VII. *Id.* at 49 n.10. That conclusion controls this case.

We acknowledge, of course, that the decision of the NYSHRD may be admitted in evidence in federal court proceedings and given appropriate weight, *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 60 & n.21; *Chandler* v. *Roudebush*, *supra*, 425 U.S. at 863 n.39. But given the extraordinarily sparse statement of the conclusions of the NYSHRD, and the limited procedures upon which they are based, little weight could be assigned to the state administrative decision as evidence. *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 60 n.21. In these circumstances, it would be an anomaly to hold that these same bare conclusions deprive petitioner of all right to a federal court adjudication.[22]

Moreover, the unique policy of Title VII, which, as explained above, conferred a right to de novo adjudication in federal court notwithstanding prior proceedings, constitutes a congressional directive which overrides the general rules of res judicata and collateral estoppel.

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[21] Title VII and state law may, of course, differ substantively as well as procedurally. See, *e.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

[22] In contrast to this Court's decision in *Montana* v. *United States*, *supra*, 440 U.S. at 164 n.11, the Second Circuit has treated the adequacy of state procedures afforded to a complainant in a particular proceeding as irrelevant to the applicability of the preclusion doctrines, explaining that the "doctrine of res judicata does not depend on whether the prior judgment was free from error." *Mitchell* v. *National Broadcasting Co.*, *supra*, 553 F.2d at 271-272 (citations omitted). But examination of the adequacy of the state procedures on which the prior decision rests to determine whether further litigation is permissible does not amount to reconsideration of the merits of the claim.

Title VII is, in this respect, to be distinguished from 42 U.S.C. (& Supp. III) 1983. In *Allen* v. *McCurry*, *supra*, slip op. 10, the Court concluded that in enacting Section 1983 "Congress was acting in a way thoroughly consistent with the doctrines of preclusion." Title VII, on the other hand, has repeatedly been held to embody a special policy permitting trial de novo, even where the issues have been considered in another forum. *New York Gaslight Club, Inc.* v. *Carey*, *supra*, 447 U.S. at 64-65, 67-68; *Chandler* v. *Roudebush*, *supra*; *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 45, 47-49 & n.10; see also *Johnson* v. *Railway Express Agency*, *supra*, 421 U.S. at 459; *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 764 (1979).

The purposes of 28 U.S.C. 1738 would not be frustrated by permitting petitioner to have a trial de novo in federal district court on his Title VII claims. The state's interest in the conclusive resolution of disputes within its jurisdiction is served by according full faith and credit to the state court's final determination of petitioner's state law claims without precluding litigation of his Title VII claim in federal court. The state's requirement that petitioner make an election of forums (see note 19, *supra*) is not disturbed by allowing petitioner to litigate his Title VII claim in federal district court. And the only issues that could be raised in the Appellate Division's proceedings—whether the NYSHRD's decision was arbitrary or capricious or unsupported by sufficient evidence—are not in issue in federal court under Title VII at all.[23] Thus, the state court's decision that the

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[23] This case may accordingly be viewed as not implicating the question whether preclusive effect need be given to state court determinations at all. Cf. *Thomas* v. *Washington Gas Light Co.*, 448 U.S. 261, 281-282 (1980) (opinion of Stevens, J.). To invoke the preclusion doctrine in the circumstances of this case is, in reality, to give effect to a decision of the state administrative agency, which, in conformity with the New York statute, made the only factual determination in the state proceedings. 28 U.S.C. 1738

state agency's action was not improper, is not collaterally attacked by petitioner's litigation in federal district court on the merits of his federal claims. *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 54.

Nor would the interests of comity between state and federal courts be furthered by a holding that a judgment of a state appellate court, reviewing a state agency's action on petitioner's state law claims, may have preclusive effect on petitioner's litigation of his federal claims in federal court. The predictable result of such a holding would be that any reasonably informed complainant would forgo his right to limited judicial review of the state agency's action on state law claims in order to ensure a trial de novo in federal court on his Title VII claims. See *New York Gaslight Club, Inc.* v. *Carey*, *supra*, 447 U.S. at 66 n.6; *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 59; compare *Allen* v. *McCurry*, *supra*, slip op. 14 n.23. Furthermore, Title VII complainants might withdraw from state agency proceedings altogether, after the statutory 60-day period, in order to avoid an agency determination in their favor which could then be appealed to the state courts. These consequences would frustrate Congress' intent that discrimination claims be resolved, where possible, on the state or local level. *New York Gaslight Club, Inc.* v. *Carey*, *supra*, 447 U.S. at 65, 66 n.6.

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does not require that preclusive effect be given to state agency decisions, however. While an administrative agency adjudication may, in proper circumstances, be given preclusive effect under the judicial doctrines of preclusion, *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 421-422 (1966), such circumstances are not present here, for the reasons we have discussed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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